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BRIEF
FOR
THE ARGUMENT OF QUESTIONS ARISING
UPON
THE PLEADINGS
ON THE
TRIAL OF ISSUES OF LAW OR FACT
IN
CIVIL ACTIONS
AT LAW, IN EQUITY, AND UNDER THE NEW PROCEDURE.

BY AUSTIN ABBOTT,
OF THE NEW YORK BAR.

The pleadings now more frequently than ever before determine the fate of the cause. Technicalities have lost importance ; and the just principle of fair notice to counsel and court has gained control, and calls for free reasoning in view of the results of forensic and judicial experience.

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PREFACE.

This volume is the first in plan and place, though not the first in publication, of the series of Brief Books with which I have been endeavoring to make the path of the practitioner in American courts more plain. This object is worthy of all the powers of all who can aid it. Our communities need and want far more professional service than they actually employ; and the two things which chiefly deter them from employing more professional assistance are, the inability of the appellate courts to dispose of all the business brought before them, and the lamentable frequency of mistrials in the courts of first instance. Whatever is done to reduce the number of mistrials below, at once diminishes the discouraging and deterrent effect which such experiences have upon clients, and diminishes the number of appeals to crowd the calendars of the courts of last resort.

I have great satisfaction in the indications I have received that this effort to elucidate the most frequently contested technical questions has aided counsel and the courts in disposing fairly of questions of procedure, and in getting readily at those worthy contests on the merits of the cause which afford the noblest field for the skill of attorney and counsel, and the real opportunities of distinction for the judge.

The present volume is larger than the others of the series, chiefly because it includes two distinct aspects of pleading, Demurrer, and Trial upon the Evidence. I should have presented them separately but for the fact that the principal questions discussed on demurrer—viz., the sufficiency of the allegations to constitute a cause of action or defence, and the jurisdiction of the subject of action—are discussed also at the trial, and determined there on the same general principles as on demurrer, subject to such modification only as fairly results from holding that he who takes issue and goes to trial thereby accepts a merely uncertain pleading in the sense most favorable to its sufficiency for purposes of trial. Therefore if the rules on Demurrer were in a separate volume, an adequate treatment of the rules applicable at trial would require the repetition of a large part of them in both volumes. By treating them together, much repetition is saved, and the reader, using the volume for either purpose, has at hand the cognate rules and authorities established in respect to the other. They have, however, been separated in statement, so as to make easy the necessary discrimination where there is any ground for refusing to allow the rules on demurrer to be applied at the trial of issues of fact, or *vice versa*.

For the like reason, the rules applied at different stages of the trial of issues of fact have been separately stated, for every practitioner of much experience knows the disappointment of relying too far on a rule that holds good at the outset of the trial, but not at its close.

A pleading is at once a notice to the adversary of what he must prepare to meet; a rule of order by which the court may restrain the latitude of conten-

tion at the trial ; and, after judgment, a record of justice done which the court may enforce and compel the parties to respect.

The rules applicable on demurrer have grown up chiefly in view of the first of these requirements, and turn on the questions, Do the pleadings present a fit question for litigation? and, Do the incidents of parties, jurisdiction, etc., make this a fit occasion?

The rules applicable at the opening of a trial of issues of fact, before going into evidence, assume that the present is a fit occasion, but leave open the questions whether the pleadings present a question within the jurisdiction of this court, and are all indispensable parties before the court; and may introduce the further questions, What mode of trial do the contents of these pleadings call for, and in what order shall the parties and issues be heard?

The opening by counsel, and the resulting reception of evidence, introduce such modification of this aspect of the case as is required by the practical construction thus actually put by the parties in the presence of the court upon the language in which they have framed the issue.

The court still holds them to questions within the general scope of the pleadings, but disregards technical objections which the objector by his own course has already disregarded.

The course of the trial, proceeding on this relaxation of the original rules, frequently obscures the lines which strict adherence to the pleadings might have preserved; and when the time for submission of the cause arrives, the question whether each party gave his adversary fair notice of the question which they have actually tried has gone by, for each has taken his part in trying it; and the time for applying the rules of order as to the method of trial is also gone; while the question what sort of judgment can the court properly render and perpetuate on its record, and enforce by its process, on the foot of these pleadings, comes into prominence.

Attention to these distinctions will at once explain the order of treatment I have pursued, which is distinctly shown in the following table of contents, and will enable the reader safely to judge how far the rules and authorities stated in one division are applicable by analogy in the stage of the proceedings treated by another division.

As in the previous volumes of this series, I have not sought to state all the cases, nor all the peculiarities of local statutory rules. My aim has been, looking at the actual practice of the courts as we see it in operation, to state the existing rules of general usefulness, and to support them with an adequate selection of authorities from all jurisdictions, and to guard them with a sufficient indication of any reasonable conflict of opinion now existing. It will be at once seen how useful is the light which the substantial rules of common-law pleading, equity pleading, and code pleading throw upon each other, and also that which the decisions in various states throw upon characteristic provisions of the statutes of other states. I cannot hope that every proposition which I have stated here will be found correct, but my aim has been in settling the terms of each proposition, to state nothing positively unless clear that it correctly represents the present practice of the courts of my own State, or of the Federal courts sitting in it, and useful also in the other States generally, and to exclude, or to mention in the notes, that which on careful consideration appears to be doubtful.

AUSTIN ABBOTT.

71 BROADWAY, NEW YORK, May, 1891.

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BRIEF ON THE PLEADINGS.

DEMURRER.

I.—THE FORM OF DEMURRERS IN GENERAL.

[The rules below stated as to the necessity of assigning the ground of demurrer in order to be heard thereon, are to be taken subject to the qualification that the Court have power at any stage of the proceeding to dismiss, if plaintiff cannot state a case entitling him to any relief, or if he shows only a case of which the Court have no jurisdiction.¹ Where this rule is not applied on the argument of a demurrer, it is because the Court favor the giving of opportunity to be heard after notice of the objection. For if the objection be disregarded and the demurrer overruled, defendant can appear on failure to answer, and object orally to the want of a cause of action or of jurisdiction of the subject.]

¹ It does not require the authority of a statute to demur if no case is stated, or if want of jurisdiction appears. *Stone vs. Stone*, 11 *N. J. L. J.*, 139; s. c., 13 *Atl. Rep.*, 245; 11 *Cent. Rep.*, 590. (Here a statute relating to divorce proceedings provided for no defence, except by answer to the petition. *Held*, that defendant might demur to the petition.) s. p., *Ponder vs. Tate*, 111 *Ind.*, 148; s. c., 12 *North East. Rep.*, 291; 9 *West. Rep.*, 629.

In *Drake vs. Drake*, 41 *Hun*, 366; s. c., 11 *Civ. Pro. R.*, 77, is a dictum that the Court cannot without consent consider the objection that it has no jurisdiction of the subject of the action, if that ground is not specified in the demurrer, which is clearly unsound, for no Court or judge is bound to proceed a step in a cause of which there is no jurisdiction.

In equity, at the hearing, other causes of demurrer may be assigned *ore tenus*. *Brinckerhoff vs. Brown*, 6 *Johns. Ch. (N. Y.)*, 149; s. p., *Taylor vs. Holmes*, 14 *Fed. Rep.*, 498.

For authorities, see below; *Demurrer; Default; Motions on the pleadings at the trial*.

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|--------------------------------------------------|--------------------------------------------------------------------|
| § 1. Statutory grounds exclusive. | § 9. Inconsistent objections. |
| 2. Precise language of statute not essential. | 10. Speaking demurrer. |
| 3. — intelligible indication enough. | 11. Objections on face of pleading alone noticed. |
| 4. Omission to assign the right ground. | 12. — facts appearing by the process. |
| 5. Wrong specification under right ground. | 13. — facts necessarily implied by the existence of the pleadings. |
| 6. General and special demurrers. | 14. Joint demurrer. |
| 7. Stipulation cannot avoid statute. | 15. Verification not required. |
| 8. Several specifications, part only being good. | 16. Informality disregarded. |

§ 1. *Statutory grounds exclusive.*—Under the new Procedure, a demurrer cannot be sustained on any ground other than those allowed in the Statute.

Marie vs. Garrison, 83 *N. Y.*, 14, 23.

Hentsch vs. Porter, 10 *Cal.*, 555.

Kenworthy vs. Williams, 5 *Ind.*, 375.

McClary vs. Sioux City R. Co., 3 *Nebr.*, 44.

Dunn vs. Barnes, 73 *N. C.*, 273.

Dodge vs. Colby, 108 *N. Y.*, 445; mod'g 37 *Hun*, 515.

(Demurrer on ground that a cause of action of which the Court had jurisdiction was united with one of which it had not, is not sustainable.)

s. p., *Carter vs. De Camp*, 40 *Hun*, 258. (Misjoinder contrary to the code as to joinder, not available under demurrer specifying a misjoinder which is not contrary to the code.)

Harper vs. Chamberlain, 11 *Abb. Pr.*, 234.

Thus, it is not good ground of demurrer that an amended petition departs from the cause of action set out in the original petition. *Hord vs. Chandler*, 13 *B. Monr. (Ky.)*, 403 [otherwise in some jurisdictions]. So, stating one cause of action in several counts is not a ground of demurrer. *Lackey vs. Vanderbilt*, 10 *How. Pr.*, 155.

But adding to a good demurrer objections not authorized by the statute—*e.g.*, assigning as a cause of demurrer that certain parts of the complaint are immaterial and redundant—does not vitiate the demurrer.

Smith vs. Brown, 6 *How. Pr.*, 383.

§ 2. *Precise language of statute not essential.*—It is enough if the demurrer substantially indicates one of the

statutory grounds. Informality in assigning, which ought not to mislead, may be disregarded.

Buscher vs. Knapp, 107 *Ind.*, 340; s. c., 8 *North East. Rep.*, 263. (Specification of ground by saying "that said paragraph does not state facts sufficient to avoid the allegations contained in the answer to which it is intended to be a reply," sufficient without expressly stating which it was.)

s. p., *Lewellen vs. Crane*, 113 *Ind.*, 289; s. c., 12 *West.*, 918, 15 *N. East.*, 515.

Connecticut Bank vs. Smith, 9 *Abb. Pr. (N. Y.)*, 168; s. c., 17 *How. Pr.*, 487. (Demurrer specified that the complaint did not state facts sufficient to constitute a cause of action—among other things, that it did not show plaintiff's capacity to sue. *Held*, that the objection that the complaint did not show plaintiff's capacity to sue was sufficiently stated.)

Cornell vs. Mayor, 9 *Hun (N. Y.)*, 285. (Complaint alleged, among other matters, the death of one Hennessy. Defendant demurred upon the ground that there was a defect of parties plaintiff in that Hennessy was omitted as a party. *Held*, as it was the evident intention of the pleader to assert that the personal representatives of Hennessy were necessary parties, the infelicitous mode of assertion ought not to prejudice the defendant, because it could not have misled the plaintiffs.)

The *contrary* notion was carried to an extreme in *Grubbs vs. King*, 117 *Ind.*, 243; 20 *N. East.*, 142. (Holding that a demurrer expressed to be upon the ground that the petition does not state facts sufficient to constitute "a good and sufficient petition," is not good as a demurrer for failure to "state facts sufficient to constitute a cause of action," under *Ind. Rev. Stat.*, 1881, § 339, cl. 5, for it does not set forth any statutory cause of demurrer.)

§ 3.—*intelligible indication enough*.—To satisfy the rule that a demurrer to one of several causes of actions or defences must specify which, it is enough if it indicates which with such certainty that it ought not to mislead.

Matthews vs. Beach, 8 *N. Y.*, 173; rev'g 5 *Sandf.*, 256.

Buscher vs. Knapp, 107 *Ind.*, 340; s. c., 8 *North East. Rep.*,

263 (under § 2 above); s. p., *Wise vs. Eastham*, 30 *Ind.*, 133; *Lagow vs. Neilson*, 10 *id.*, 183.

s. p., *Crasto vs. White*, 52 *Hun* (N. Y.), 473; s. c., 23 *State Rep.*, 535. (Holding it enough that it was obvious from the contents of the answer that it could only relate to the first cause of action.)

[For other cases see § 19 below.]

Contra, *Atchison vs. Lee*, 75 *Ind.*, 132; s. c., (mem.) 6 *Weekly Cin. L. Bul.*, 541. (Holding that the contents of the reply expressly referring to a fact set forth in a third answer were not a sufficient indication, because "the answer cannot be thus made part of the reply.")

§ 4. *Omission to assign the right ground.*—A statutory ground of demurrer, not expressly assigned in the demurrer, at least in substance, is not available on the argument.

Alabama, etc., R. R. Co. vs. Watson, 42 *Ala.*, 74. (Holding that it could not be entertained in the face of the statute, even though the attorneys stipulate in writing that the demurrer shall be deemed as if specifying every ground that could be legally stated.)

Jewett vs. Honeycreek, etc., Co., 39 *Ind.*, 245. (Demurrer assigning no ground.)

Washington vs. Eames, 6 *Allen* (Mass.), 417; *Suffolk Bank vs. Lowell Bank*, 8 *id.*, 356; *Proctor vs. Stone*, 1 *id.*, 193. Demurrer assigning wrong ground.

Adrian Water Works Co. vs. City of Adrian, 64 *Mich.*, 584; s. c., 31 *Northwest. Rep.*, 529.

Carter vs. De Camp, 40 *Hun* (N. Y.), 258.

Berney vs. Drexel, 33 *id.*, 419.

Dodge vs. Colby, 108 *N. Y.*, 445; mod'g 37 *Hun*, 515. (*So held*, because the N. Y. Statute Code Civ. Pro., § 490, requires the ground to be specially stated.)

§ 5. *Wrong specification under right ground.*—If the ground assigned in the demurrer is expressly qualified by specifications, a particular objection not within the specifications is not available on the argument.

State ex rel. Yard vs. Borough Commrs. of Ocean Beach, 48 *N.J.L.*, 375; s. c., 5 *Atl. Rep.*, 142. (Holding that where the statute does not require it, volunteering a specifica-

tion estops the party from relying on any particular not specified.)

Nellis vs. De Forest, 16 *Barb. N. Y.*, 61.

§ 6. *General and special demurrers*.—At common law, in equity, and in Courts of the United States, to matter of substance a general demurrer is sufficient; but where the objection is to matter of form only, a special demurrer is necessary.¹

A special demurrer must specify the defect relied on sufficiently to disclose to the adversary the particular objection he must answer; and it is not enough, without doing so, merely to specify the nature of the objection or the point of law.²

Where the demurrer is to a part only of the adverse pleading, it must specify what part; and it is not enough to describe it as “so much as” relates to a particular subject or object.³

¹ *Christmas vs. Russell*, 5 *Wall.*, 290, 303. (Common-law action; general demurrer to plea of fraud, *held* not sufficient to entertain the objection that the acts constituting fraud were not stated, but sufficient to entertain the objection that fraud could not be a defence, because the judgment pleaded was conclusive.)

The United States Courts cannot give judgment for any defect, or want of form, “except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such Court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.” *U. S. R. S.*, § 954.

A defect is formal when a defendant must of necessity be guilty of a breach of the law, and liable to an action if the declaration is true. *Jacob vs. U. S.*, 1 *Brock.*, 520, 524, *MARSHALL*, Ch. J. (Holding that under a statute imposing penalty for rescuing or “causing to be” rescued, an allegation in the alternative was defective in form merely.)

The language of the Court in *Rosenbach vs. Dreyfuss*, 1 *Fed. Rep.*, 391, 395, implies that this rule is only in force in states where special demurrers are retained. But the actual ruling was only that this act did not preclude giving effect to the state statute allowing amendment of course.

As to the form of demurrers, the safer opinion is that, while leave to amend as of course is not inconsistent with § 954, the Courts of the United States may still require demurrers to specify objections of form.

* *Childress vs. Emory*, 8 *Wheat. (U. S.)*, 642, 671. (Debt in the *detinet*, on a note, against an executor. On appeal it was suggested at the bar that the action ought not to have been in *detinet* only, but in *debet et detinet*; but it was not assigned as cause of demurrer. (And the Court say that this is a mistake, "and if it had been otherwise, the objection could only have been taken advantage of on special demurrer, for it is but a matter of form and cured by our statute of *jeofails*."))

Dwight vs. Central Vermont R. Co., 9 *Fed. Rep.*, 785. (Suit by stockholders against directors, etc. Defendant company demurred for want of necessary parties. *Held*, demurrer insufficient, because not specifying the parties whose non-joinder is fatal.)

Martin vs. Bartow Iron Works (U. S. Dist. Ct. N. D. Ga.), 35 *Ga.*, 320. (Debt, on sealed note. Defendant pleaded nine pleas; plaintiff put in special demurrers to six of them, three of which demurrers were for duplicity, but merely assigning that the pleas were double, in that they contained several distinct matters of defence. *Held*, insufficient. The pleader must specially show wherein the duplicity consists. Demurrers overruled.)

* *Atwill vs. Ferrett*, 2 *Blatchf.*, 39. (Bill in aid of suit at law for copyright infringement, seeking discovery, etc. Defendant G. filed attempted special demurrers, but which only referred to the parts of the bill objected to as "so much of the bill as seeks," etc. *Held*, insufficient, and not admissible. They should point out by paragraph, page, or folio where the objectionable matter is to be found. Overruled, except as to the objection of multifariousness in the bill.)

Chicago, St. Louis & N. O. R. Co. vs. Macomb, 2 *Fed. Rep.*, 18. (Bill for discovery and relief in respect to certain bonds issued on plaintiff's road. Special demurrer "to so much of" certain specified paragraphs "or elsewhere," which sought discovery as to the bonds, etc., on ground that plaintiff has stated no case entitling it

to the relief. *Held, insufficient*, as too indefinite, although the demurrers were overruled on the merits.)

§ 7. *Stipulation cannot avoid statute.*—A statute prescribing the mode in which objections must be stated in a demurrer will not be disregarded by the Court in deference to a stipulation that a demurrer which does not conform to the statute shall be treated as if it did.

Alabama, etc., R. R. Co. *vs.* Watson, 42 Ala., 74. (Holding that no agreement of counsel can render nugatory a statutory prohibition imposing a rule of pleading intended to control the action of the Courts.)

[This rule is fit to be evaded by immediate amendment.]

§ 8. *Several specifications, part only being good.*—It is the better opinion that a demurrer which specifies a sufficient objection in support of the ground it assigns is not vitiated by specifying also an insufficient objection.

Harrison *vs.* Hogg, 2 Ves. Jr., 323. (Holding that if one ground is held good, it is unnecessary for the Court to examine the others.)

The *contrary* was held in Anderton *vs.* Wolf, 41 Hun, 571, on demurrer for defect of parties, specifying as necessary parties (1) three directors of the corporation whose affairs were involved, (2) three inspectors of election, and (3) the transferees of certain securities. *Held*, that as it did not appear by the complaint that there were three inspectors, the whole ground of demurrer must fail, because the Code does not contemplate that one ground of demurrer should be sustained in part and overruled in part.

[This ruling is extremely technical, and does not seem to rest on any substantial reason, and the present practice is in harmony with the doctrine that while a general objection may be bad in whole if bad in part, a specific objection is not bad merely because another specific objection is bad.]

§ 9. *Inconsistent objections.*—It is the better opinion that a ground of demurrer, sufficient if it stood alone, cannot be disregarded because it assumes the insufficiency of another separate ground assigned in the same demurrer,

if the points of law relied on are not inconsistent with each other.

The contrary was held in *Berford vs. Barnes*, 45 *Hun*, 253, where a demurrer upon the ground that the facts stated are insufficient to constitute a cause of action, and upon the ground that there is a misjoinder of causes of action, is inconsistent, for if no cause of action is stated, there can be no misjoinder of causes. [Citing *Sullivan vs. N. Y., New Haven, etc., R. R. Co.*, 1 *Civ. Pro. R.*, 285.]

The better view is that a defendant has the right to submit several views of the law not inconsistent in themselves, as alternative grounds; and this is in harmony with the doctrine of the New Procedure, which allows even inconsistent defences to be tried together.

In the *Cincinnati, etc., R. W. Co. vs. Citizens' Nat. Bank*, 22 *Weekly L. Bull.*, 248, an action joining all the holders of an over-issue of stock for the purpose of determining which of the certificates was valid, came up on a demurrer which assigned as one ground that the petition did not state facts sufficient to constitute a cause of action, and as another that there was a misjoinder of parties defendant. The Court, overruling the demurrer, said: "There is in one aspect of the case little difference between the two grounds of demurrer. The principal relief sought consists of bringing in all the defendants so that their claims may be sifted, and the true separated from the false; and whether it be termed misjoinder or want of a cause of action, the objection is much the same, except in this, that if the allegations of the petition are such as to show that all the certificates are valid, or that the company is estopped to dispute their validity, then there can be no cause of action, and that without reference to the question of joinder."

§ 10. *Speaking demurrer*.—A demurrer cannot be aided by any allegation or suggestion of fact contained in it. It can only point to what appears or fails to appear in the pleading demurred to.¹ If it alleges or denies a material fact, it must be overruled.²

But mere argument, and suggestions or allegations of fact, if immaterial, so that they would not avail in a plea or answer, may be disregarded as surplusage.³

¹ *Stewart vs. Masterson*, 131 *U. S.*, 151; s. c., 33 *L. ed.*, 114; 9 *Supm. Ct. Rep.*, 682.

² *Story's Eq. Pl.*, 411.

Clark vs. Van Deusen, 3 *Code R.*, 219. (Holding that a pleading containing a denial cannot avail as a demurrer.)

s. p., *Camp vs. Bedell*, 52 *Hun*, 63; s. c., 23 *State Rep.*, 400; 5 *N. Y. Supp.*, 63. (Holding that the adverse party cannot treat as a demurrer a pleading or answer containing an objection to the sufficiency of the complaint.)

Bernard vs. Morrison, 2 *Civ. Pro. R. (McCarty)*, 425; rev'g 64 *How. Pr.*, 108; s. c., 2 *Civ. Pro. R. (Browne)*, 399; and 2 *id. (McCarty)* 213.

The test whether a defence is an answer or demurrer is, Does it require any facts to be proved to sustain it? *Struver vs. Ocean Ins. Co.*, 16 *How. Pr. (N. Y.)*, 422.

³ This is the Chancery rule. *Cawthorn vs. Chalie*, 2 *Sim. & S.*, 127; *Davies vs. Williams*, 1 *Sim.*, 5; and such a demurrer was not overruled as "a speaking demurrer."

§ 11. *Objections on face of pleading alone noticed.*—

A demurrer cannot be sustained unless the objection is apparent on the face of the pleading, either expressly or by reference to another part of the pleadings.

The Court cannot notice any other fact because it is suggested by counsel, except such as are admitted for the purpose by the adverse counsel, and such as may be judicially noticed without pleading or proof.

Coe vs. Beckwith, 10 *Abb. Pr. (N. Y.)*, 296; s. c., 31 *Barb.*, 339; 19 *How. Pr.*, 398. (It is not within the office of a demurrer to name parties who should have been joined; and no conclusion is to be drawn from such statements adverse to the plaintiff.)

Union Mutual Ins. Co. vs. Osgood, 1 *Duer (N. Y.)*, 707. (Where want of legal capacity to sue does not appear on the face of the complaint, the objection must be taken by answer.)

Cragin vs. Lovell, 88 *N. Y.*, 258, rev'g *Cragin vs. Quitman*, 22 *Hun (N. Y.)*, 101. Specific performance: the complaint described the land in question as a plantation in Louisiana known as "Live Oaks." The answer set up as a counter-claim damages for injury to real property, designating such property by the terms "said Live Oaks,"

“said plantation.” *Held*, that it sufficiently appeared on the face of the counter-claim, by aid of the words of reference, that the land in question was in the State of Louisiana and a demurrer to the jurisdiction should be sustained.

§ 12. — *facts appearing by the process*.—A demurrer to complaint cannot be sustained by anything which appears only by the process,¹ or return of service,² or by other parts of the record not forming a part of the pleadings.

Exhibits form a part of the pleadings for this purpose, in some jurisdictions.³

But when the sufficiency of the pleading depends upon its interpretation in respect to the nature or frame of the intended action, the Court may refer to the process, and deem it controlling upon that question in a case otherwise doubtful.⁴

¹ *Cochran vs. American Opera Co.*, 20 *Abb. N. C.*, 114. (So holding where the title of the complaint showed that the action was brought on behalf of the plaintiffs named, and all other creditors similarly situated who may come in and adopt it, but there was no direct allegation in the complaint that they sued in that manner; and the summons gave only the individual names of the parties, without any similar indication.)

Variances between the writ and the declaration are matters pleadable in abatement only, and cannot be taken advantage of on general demurrer to the declaration. *Duvall vs. Craig*, 2 *Wheat.*, 45; *Wilder vs. McCormick*, 2 *Blatchf.*, 31; *Wilkinson vs. Pomeroy*, 10 *id.*, 524.

² *Swann vs. Phoenix Iron and Coal Co.*, 58 *Ga.*, 199.

Where a bill alleged that defendant was of a certain county, but the sheriff returned “not to be found,” a demurrer based on the ground of want of jurisdiction on account of non-residence was properly overruled. The demurrer admitted that defendant was of such county, and the return of the sheriff could not be considered on such an issue to the contrary.

³ See below, Exhibits and Statutes requiring them.

⁴ *Supervisors of Kewaunee County vs. Decker*, 30 *Wisc.*, 624. (Holding that where the complaint contained averments appropriate to an action for money had and

received, and others (in the same count) appropriate to one in tort for the conversion of money,—*held*, reversing the judgment below which had overruled the demurrer, that the fact that the summons was for relief showed that the action must be treated as one in tort.)

§ 13. *Facts necessarily implied by the existence of the pleadings.*—A fact which is necessarily implied by the mere existence of the pleadings before the Court on a demurrer may be assumed by the Court, for the purpose of determining the demurrer, as if it were formally alleged; for instance, the fact that the party was living at the time of pleading;¹ or that a party pleading in his own favor a contract made by a third person, has ratified the agency of the third person in making it;² or that an adverse claim is made by the party pleading such a claim;³ or that a defendant by appearing has waived an objection to jurisdiction of the person.⁴

But a fact not thus *necessarily* implied, though probable, cannot be thus noticed.⁵

¹ Freeman *vs.* Frank, 10 *Abb. Pr.*, 370.

² Walker *vs.* Mobile, etc., R. R. Co., 34 *Miss.* 245. (Action on subscription for stock in plaintiff-corporation: plea that the person who took the subscription as agent had no authority, *held*, on demurrer, insufficient. The Court say: "The act was adopted and ratified by the company, as was fully shown by the act of bringing suit upon the subscription. After such act of ratification it would not have been within the power of the company to disavow the contract and to deny that the plaintiff was entitled to all the privileges of a stockholder. And as the act of ratification appeared by the record, it was competent for the Court to notice it in determining the sufficiency of the plea.")

³ Thus the answer of a defendant in interpleader may be read to show that adverse claims are made. Chervet *vs.* Jones, 6 *Mad.*, 267. See also § VI. 6, *Adverse Claims*.

⁴ Common practice.

⁵ Commonwealth *vs.* Moore, 20 *Mass.* (3 *Pick.*), 194. (Pleading by guardian held not an admission of the party's

infancy: so held where the *appearance* was by attorney. The Court say the guardian might have been appointed for some other reason than infancy.)

§ 14. *Joint demurrer*.—A joint demurrer is not sustainable for one demurrant, unless sustainable for all.

[A harsh technical rule, fit to allow a prejudiced demurrant to circumvent by amendment; see § 26.]

Holzman vs. Hibben, 100 *Ind.*, 338. (Action for goods sold against members of a partnership. It was objected on joint demurrer by all of the defendants that, the bill of particulars being only against one of the defendants, no cause of action was shown against the other defendants. *Held*, that the question could not be raised. In order to be available the demurrer should have been interposed separately by each defendant, or jointly only by the defendants against whom no cause of action was shown.) s. p., *Wilkerson vs. Rust*, 57 *id.*, 172. (Foreclosure of mechanic's lien.)

Clark vs. Lovering, 37 *Minn.*, 120; s. c., 33 *Northwestern Rep.*, 776 [citing *Lewis vs. Williams*, 3 *Minn.*, 151 (*Gil.*, 95); *Goncelier vs. Foret*, 4 *Minn.*, 13.

People vs. Mayor, etc., of N. Y., 8 *Abb. Pr.*, 7; s. c., 28 *Barb.*, 240.

Oakley vs. Tugwell, 33 *Hun*, 357 [citing *N. Y. & New Haven R. R. Co. vs. Schuyler*, 17 *N. Y.*, 592.]

Fish vs. Hose, 59 *How. Pr. (N. Y.)*, 238.

Eldridge vs. Bell, 12 *How. Pr. (N. Y.)*, 547. (Where a good cause of action of an equitable nature is stated in the complaint against one of several defendants though not as against the others, a joint demurrer by all of the defendants is improper.)

Philips vs. Hagadon, 12 *How. Pr. (N. Y.)*, 17.

Brownson vs. Gifford, 8 *How. Pr. (N. Y.)*, 389, 392. The joinder of improper parties as defendants is only available as a ground of demurrer by the defendants so improperly joined, and is not a ground for a joint demurrer. [Citing *Story Eq. Pl.*, § 509, 544; *Van Santvoord's Pl.*, 384.]

Dunn vs. Gibson, 9 *Neb.*, 513.

Walker vs. Popper, 2 *Utah*, 96.

Webster vs. Tibbets, 19 *Wis.*, 439; s. p., *Willard vs. Reas*, 26 *Id.*, 540. Compare 44 *Id.*, 49.

[*Contra*, *Story's Eq. Pl.*, § 445; *Crane vs. Deming*, 7 Conn., 387, 394, (the case of a joint demurrer by husband and wife, overruled as to the husband and sustained as to the wife).]

§ 15. *Verification not required*.—Statutes which require that pleadings denying the execution of written instruments be verified, do not apply to a demurrer, even though the objection raised under the demurrer be that the execution of the instrument did not on its face bind the party demurring.

Hitchcock vs. Buchanan, 105 U. S., 416. (Objection that the contract sued on was that of the defendants' principal, not of themselves.)

§ 16. *Informality disregarded*.—Informality in a demurrer does not render it error to sustain it, if the pleading to which it is interposed is bad.

Palmer vs. Hayes (Ind. '87), 11 *West. Rep.*, 672. (MITCHELL, J., says: "The most that can be said is, that a bad answer went out of the record upon an informal demurrer; or, in other words, that the Court reached a correct conclusion, in a manner not altogether formal.")

[As to *Amending*, see § 26.]

II. RULES TURNING ON WHAT ARE THE PLEADINGS DEMURRED TO.

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| § 17. The copy served. | § 23. Several causes of action or defences, and demurrer to the whole. |
| 18. Original not considered after amendment. | 24. Demurrer to part of commingled statement. |
| 19. Slip in addressing. | 25. Effect of answering pending demurrer. |
| 20. Decision on original. | 26. Amending. |
| 21. One count or defence not aided by another. | |
| 22. General allegation applicable to all of several divisions. | |

§ 17. *The copy served controls*.—Under the New Procedure, in case of a discrepancy between the pleading on

file, and a copy served, the party on whom it was served may rely on the copy, and the party who served it cannot as matter of right object that the original differs.¹

Otherwise under the old practice.²

¹ *McCarron vs. Cahill*, 15 *Abb. N. C.*, 282; s. c., 1 *How. Pr. N. S.*, 305. (Motion to overrule demurrer as frivolous.) *Fiske vs. Noble*, *N. Y. Daily Reg.*, May 31, 1883. (Demurrer to complaint.) [Both *N. Y. City Ct.* cases, in harmony with Supreme Court practice. But the Court may give leave to amend, or amend instanter. See also § , Clerical error.]

s. p., *Trowbridge vs. Didier*, 4 *Duer*, 448. (Question of variance at trial.)

² *Wood vs. Bulkley*, 13 *Johns.*, 486. (Question of variance at the trial.)

§ 18. *Original not considered after amendment.*—On demurrer to an amended or substituted pleading, the Court cannot notice the contents of the original pleading.¹ Otherwise, where an amendment is in terms only an addition.²

¹ *Washer vs. Bullitt County*, 110 *U. S.*, 558, 561.

s. p., *Tompkins vs. Hollister* (*Mich.*), 27 *Northwest. Rep.*, 651. (Plea to original bill not noticed on demurrer to amended bill.)

State vs. Simpkins, 77 *Iowa*, 676; s. c., 42 *N. W.*, 516. ROTHROCK, J., said: "Where a substituted pleading is filed in an action, the original may possibly be used as evidence against the party by reason of contradictory statements or the like; but on a demurrer to the substituted pleading the two pleadings cannot be considered."

² In some jurisdictions this is a question of intention. See *Winter vs. Quarles*, 43 *Ala.*, 692; *Dunlap vs. Robinson*, 12 *Ohio St.*, 530; *Northern Bk. vs. Warsaw Deposit Bk.*, *Ky.*, 1889, 11 *Southwest. Rep.*, 16.

§ 19. *Slip in addressing.*—A demurrer served after the pleading of the adversary has been amended, may be deemed to be addressed to the amended pleading, since it

could not be to the original; and the omission to state that the amended pleading was the one demurred to may be disregarded.

McNab *vs.* Styles, LAWRENCE, J., N. Y. Supm. Ct., 1881.
Not reported.

[For other cases see § 3 above.]

§ 20. *Decision on original*.—A decision overruling a demurrer to an original pleading does not preclude a demurrer to an amended pleading.¹

Otherwise if the second pleading raises precisely the same question of law which was disposed of by the Appellate Court upon the former pleading.²

¹ Marie *vs.* Garrison, 13 *Abb. N. C.*, 210, 215, 321; Hauselt *vs.* Fine, 18 *id.*, 142.

s. p., Post *vs.* Pearson, 108 *U. S.*, 418; aff'g 9 *Northwest. Rep.*, 684.

² Chaffin *vs.* Taylor, 116 *U. S.*, 567, 570. MATTHEWS, J., said: "The rejoinder which the Court [below] permitted the defendant to file tendered no issue of fact, but one of law merely; and every question of law in the case had been covered by the former judgment of this Court in this case. The proper action of the Court [below] upon the mandate of this Court would have been to have entered judgment on the pleadings in favor of the plaintiff, and proceeded to an assessment of his damages."

§ 21. *One count or defence not aided by another*.—A demurrable defect in one separate cause of action¹ or defence² cannot be aided by allegations contained in another cause of action or defence which is separately stated in the same pleading, unless expressly connected therewith by appropriate reference; for which purpose any words indicating intent to make one division of the pleading complete by reference to a specified matter stated in another is enough.³

¹ Farris *vs.* Jones, 112 *Ind.*, 498; s. c., 14 *Northeast. Rep.*, 484, 487; 12 *West. Rep.*, 169. (Tax-payer's action. *Held*,

that an additional cause of action added by amendment was bad for not alleging plaintiff's interest. Citing *Smith vs. Little*, 67 *Ind.*, 549; *Entsminger vs. Jackson*, 73 *Ind.*, 144; *Lynn vs. Crim*, 96 *Ind.*, 89; *Ludlow vs. Ludlow*, 109 *Ind.*, 199; 9 *N. E. Rep.*, 769.)

Victory Webb Mfg. Co. vs. Beecher, 55 *How. Pr.*, 193; *Anderson vs. Speers*, 58 *How. Pr. (N. Y.)*, 68.

s. p., at common law, *Hughes vs. Moore*, 7 *Cranch*, 176; 3 *Law. ed.*, 307. (Holding that oyer of a deed set forth in the first count does not make that deed part of the record so as to apply it to other counts in the declaration.)

[The reasons for this technical rule are that otherwise the Court must search the whole pleading to ascertain if any one division is good; and that if a division be struck out, the remainder ought to be good independent of what is gone.]

* *Davis vs. Robinson* 67 *Iowa*, 355; s. c., 25 *Northwest. Rep.*, 280.

Alterman vs. Parfitt, *N. Y. Daily Reg.*, June 28, 1884 (N. Y. City Ct.). (A separate defence in an answer cannot be sustained on demurrer by resorting to denials contained in another defence, to which it does not refer for the purpose.)

Catlin vs. Pedrick, 17 *Wis.*, 88. (DIXON, J.: The demurrer to the second paragraph of answer was properly sustained, and the evidence under the third properly excluded. The mistake of the pleader was in separating them so as to make two defences out of matter which constituted but one. Together they would have made out a counter-claim, and let in the proofs; but apart, neither was sufficient to permit any evidence to be received under it. Plaintiff's attorney should have asked leave to amend by striking out the numerals which distinguished them as separate answers, and blending them into one.)

* *Jones v. Heaton*, 1 *McLean*, 317. (Allegation of citizenship in first count shows jurisdiction as to other counts referring to it.)

Hockstedler vs. Hockstedler, 108 *Ind.*, 506; s. c., 7 *West. Rep.*, 75, 77. (Exhibit filed may be referred to in each division of the pleading as a part thereof.)

Velie vs. Newark City Ins. Co., 23 *Weekly Dig. (N. Y.)*, 456. (Action on fire insurance, first count describing the property as belonging to one C.; second count referring to it as the property hereinbefore set forth. *Held*, a sufficient reference; defendant could not have been misled.)

Cragin vs. Lovell, 88 *N. Y.*, 258; s. c., 2 *Civ. Pro. R. (Browne)*, 128; rev'g *Cragin vs. Quitman*, 22 *Hun*, 101. (A separate defence may contain all the requisite allegations within itself to make it a perfect counter-claim, or it may refer to papers annexed, or to other parts of the answer, or to the complaint, and the matters thus referred to are just as much a part of the counter-claim as if written at length therein. So held where a demurrer to a counter-claim for waste committed to land outside of the State for want of "jurisdiction of the subject thereof" was erroneously overruled, on the ground that the fact of its location out of the State did not "appear on the face of the counter-claim.") [*Code Civ. Pro.*, § 495.]

Freeland vs. McCullough, 1 *Den. (N. Y.)*, 414. (Allegation in a later count that the indebtedness therein alleged was "for the same consideration in the last preceding count of the declaration set forth," held a sufficient reference.)

Woodbury vs. Delap, 1 *Supm. Ct. (T. & C.)* 20; s. c., 65 *Barb.*, 501. (The words "as above stated" held a sufficient reference.)

Bogardus vs. N. Y. Life Ins. Co., 101 *N. Y.*, 328. Where a subsequent count in a complaint states that plaintiff "repeats and reiterates all the allegations hereinbefore contained, and makes them a part of this her second cause of action," assuming that the allegations of the former count are thereby properly incorporated in the second count, they must be construed in connection with the allegations of the latter count in determining the sufficiency of such count; and if any inconsistency exists between the two counts, the allegations of the second must be adopted as containing the statement intended to be relied on by the pleader.

Beckwith vs. Mollohan, 2 *W. Va.*, 477. If the second count is not good without aid of the reference to the first by the phrase "as aforesaid," it is proper to refer to the first for the purpose of ascertaining time and place, etc., and make the second count good in that way, the first count being a good one.

Dorr vs. McKinney, 9 *Allen (Mass.)*, 359. (A count for money had and received, which refers to another count where the particulars of the claim are set forth, is not subject to demurrer for the reason that no bill of particulars is filed with it.)

[*Contra*, *Potter vs. Earnest*, 45 *Ind.*, 416. In an action on a promissory note, a paragraph of an answer setting up a collateral agreement going to a partial failure of con-

sideration, which for the purpose of showing the consideration refers to and adopts a former paragraph, is bad on demurrer. The facts could only become a part of the paragraph by setting them out by averment.]

[*Compare with Stewart vs. Balderston*, 10 *Kans.*, 131. (Holding that although the same event can be stated once for all in the same pleading if it be subsequently properly referred to, yet one general statement cannot be made and then referred to in different counts in order to describe a number of distinct events of a similar character. An objection of this kind can be reached by demurrer after a motion to make more definite has been interposed and overruled.)]

§ 22. *General allegation applicable to all of several divisions.*—A general allegation not included exclusively in one separate cause of action or defence, but so stated that, from its position as introductory to all, or otherwise, it appears applicable to all, is to be considered in connection with each, though not expressly referred to therein.

West vs. Eureka Imp. Co., 40 *Minn.*, 394; s. c., 42 *N. W.*, 87. (Corporate existence of a party.)

Fisher vs. Universal Cooking Crock Co., *N. Y. Daily Reg.*, Apr. 26, 1887; *Abb. Ann. N. Y. Dig.* 1888, Pl., ¶ 11. (Corporate existence of a party.)

[So also of the usual allegation of citizenship or residence, to give jurisdiction to some Courts, or of leave to sue in cases where that is requisite.]

Rider vs. Robbins, 13 *Mass.*, 284. An averment of demand and refusal in one count suffices for any number of counts involving the same transaction, although not referred to in such counts.

[For cases *contra*, see last note.]

A count may be so considered in aid of others, even after it has been abandoned. *Jones vs. Van Zandt*, 5 *McLean*, 214.

§ 23. *Several causes of action or defences, and demurrer to the whole.*—A demurrer to a complaint or answer, as a whole, for not stating facts sufficient to constitute a cause of action or defence, cannot be sustained

if there is more than one cause of action or defence, stated, and any one is good.¹

But a single demurrer, expressed to be to each of several causes of action or defences, may be sustained as a demurrer to any one that is bad.²

Dallas County vs. Mackenzie, 94 *U. S.*, 660.

Lowe vs. Burke, 79 *Ga.*, 164; s. c., 3 *Southeast. Rep.*, 449.

Plymouth vs. Milner, 117 *Ind.*, 324; s. c., 20 *Northeast. Rep.*, 235; Western Union Teleg. Co. vs. Yopst (*Ind.*), 9 *West. Rep.*, 76; s. c., 11 *Northeast.*, 16; Stout vs. Turner 102 *Ind.*, 418; s. c., 3 *West Rep.*, 303 [citing *McCallister vs. Mount*, 73 *Ind.*, 559].

Wright vs. Connor, 34 *Iowa*, 240. [s. p., in case of demurrer to whole answer containing several defences.]

Missouri Pacific R. Co. vs. McLiney, 32 *Mo. App.*, 166; Hale vs. Omaha Nat. Bk., 49 *N. Y.*, 626; Swords vs. Northern Light Oil Co., 17 *Abb. N. C.*, 115.

Langley vs. Metropolitan Life Ins. Co. (*R. I.*, 1887), 11 *Atl.*, 174; 5 *New Eng.*, 334.

Wright vs. Smith, 81 *Va.*, 777. (Applying same rule where a single count contains several matters which are divisible.)

Robrecht vs. Marling, 29 *W. Va.*, 765, 769; 2 *Southeast.*, 827.

Douglass vs. Satterlee, 11 *Johns.*, 16. (Same rule at common law, and in such case a bad count cannot be aided by what is contained in another count not expressly referred to as a part of the former. *Ib.*)

For other cases see Griffiths vs. Henderson, 49 *Cal.*, 566; Holbert vs. St. Louis, Kansas City & Northern R. Co., 38 *Iowa*, 315; Bonney vs. Bonney, 29 *Iowa*, 448; Seaver vs. Hodgkin, 63 *How. Pr.*, 128; Barner vs. Morehead, 22 *Ind.*, 354; Martin vs. Mattison, 8 *Abb. Pr.*, 3; Butler vs. Wood, 10 *How. Pr.*, 222; Newbery vs. Garland, 31 *Barb.*, 121; Jaques vs. Morris, 2 *E. D. Smith*, 639; Cooper vs. Clason, 1 *Code R., N. S.*, 347; Clark vs. Smith, 4 *West Coast Rep.*, 90; Townsend vs. Jemison, 7 *How. U. S.*, 706; Carson vs. Cock, 50 *Tex.*, 325.

Strange vs. Manning, 99 *N. C.*, 165; s. c., 5 *Southeast. Rep.*, 900.

Newlon vs. Reitz, 31 *W. Va.*, 483; s. c., 7 *Southeast. Rep.*, 411.

² Kennagh vs. McGolgan, 21 *N. Y. State Rep.*, 326; s. c., 4 *N. Y. Supp.*, 230. (Holding a demurrer "to each and every defence contained in the answer" the same in

effect as though plaintiff had demurred separately to each defence.)

Sanford *vs.* Lowenthall, (*Ky. Ct. App.*, 1880); 5 *Ky. Law Rep. & Rev.*, 206.

Rennick *vs.* Chandler, 59 *Ind.*, 354.

s. p., Robrecht *vs.* Marling, 29 *W. Va.*, 765; s. c., 2 *South-east. Rep.*, 827.

A specification which informs the Court and party what is intended is enough, though informal. *Indiana B. & W. R. R. Co. vs. Dailey*, 110 *Ind.*, 75; 10 *Northeastern Rep.*, 631. (Holding that a demurrer expressed to be "separately to the 1st, 2d, 3d" [*etc.*] paragraphs, for the reason that none of said paragraphs state facts sufficient [*etc.*], was a good demurrer to each.)

§ 24 *Demurrer to part of commingled statement.*—Different causes of action, or defences, contained in the same pleading, although stated as one, may be demurred to separately.

Wright *vs.* Connor, 34 *Iowa*, 240.

Harris *vs.* Eldridge, 5 *Abb. N. C. (N. Y.)*, 278.

Wiles *vs.* Suydam, 64 *N. Y.*, 173.

Clarkson *vs.* Mitchell, 3 *E. D. Smith (N. Y.)*, 269. (Holding that defendant may demur to one and answer as to another of several causes of action in a commingled statement.)

§ 25. *Effect of answering pending demurrer.*—The Court may treat the service of an answer or reply as a waiver of a demurrer previously interposed by the same party;¹ but may in its discretion hear the cause on demurrer, notwithstanding the answer.²

¹ Barbey's Appeal, 12 *Cent.*, 144; 119 *Pa. St.*, 413; s. c., 13 *Atl. Rep.*, 451; 21 *W. N. C.*; 226.

² Wilson *vs.* McIntire, 73 *Iowa*, 711; 36 *N. W.*, 715. Defendant filed a demurrer to the petition, and afterward an answer, indorsed "Filed subject to demurrer." The Court subsequently sustained the demurrer, and plaintiff elected to stand on his petition, and appealed. *Held*, that irrespective of any effect of the indorsement on the answer, the hearing of the demurrer was

proper, as the Court might have allowed the answer to be withdrawn, and then allowed a demurrer; and what was done was the equivalent of that.

§ 26 *Amending*.—The power of the Court¹ to amend, and to give a party leave to amend, extends to demurrers.² But it is very rarely invoked, demurrers being usually regarded as dilatory.

¹ The U. S. statute is U. S. R. S., § 954. The New York statute is Code Civ. Pro., § 723. The better opinion is that the Court has also an inherent power of amendment.

Suckley *vs.* Slade, 5 *Cranch C. C.*, 123. (Withdrawal allowed.)

Offutt *vs.* Beatty, 1 *Cranch C. C.*, 213. (Leave to amend a demurrer which did not go to the merits, refused.)

Cooper's Eq. Pl., 115; *Mitf. Eq. Pl.*, 214, n. (l), 217, n. (x); *Baker vs. Mellish*, 11 *Ves.* 70; *Dell vs. Hale*, 2 *Y. & Col. Ch.*, 1, 3. (Amendment by narrowing terms of demurrer.)

² *Taylor vs. Holmes*, 14 *Fed. Rep.*, 498, 499; *dictum per DICK, J.*: "If the causes of demurrer are not formally set forth, plaintiff may object, and require them to be thus stated."

[As to *disregarding informality*, see § 16.]

III.—WHAT LAW GOVERNS IN THE UNITED STATES COURTS.

26. State practice in U. S. Court § 28. Statutory action given by common-law name.
—General rule.

27. — "as near as may be."

29. Use and form of demurrer.

30. Time of hearing.

§ 27. *State practice in U. S. Court.—General rule.*—The State practice of the State in which an United States Circuit or District Court is sitting governs the

"pleadings and form and mode of proceeding," in civil causes, other than in equity and admiralty,¹ and *in rem* for forfeiture;² except where the State practice rests only in unwritten rules, and the United States Court has a contrary rule.³

But this does not allow the joinder of an equitable with a legal cause of action, nor the interposition of equitable defences⁴ (as distinguished from the mere application of such rules of equity as are followed by common-law Courts),⁵ even in causes removed from a State Court after such pleading there.⁶

Nor does it in general take away the substantial rights of a party,⁷ nor the inherent common-law powers of a judge.⁸

Nor does it dispense with the application of statutes of the United States expressly regulating pleadings or the form or mode of proceeding.

In the application of the rule, statutes of the United States are paramount to conflicting State statutes and rules and usages of the State Court.⁹

State statutes and constitutional provisions and written rules of the State Courts are paramount to both rules and usages of the United States Court.¹⁰

Written rules of the United States Courts are paramount to unwritten usages of State Courts.¹¹

¹ *U. S. R. S.*, § 914.

² *Coffey vs. United States*, 117 *U. S.*, 233.

³ *Osborne vs. City of Detroit*, 28 *Fed. Rep.*, 385.

⁴ *Montijo vs. Owen*, 5 *Abb. N. C.*, 110; s. c., 14 *Blatchf.*, 324. An equitable defence or counterclaim will be struck out on motion. *Herklotz vs. Chase*, 32 *Fed. Rep.*, 433; *Church vs. Spiegelburg*, 31 *id.*, 601.

⁵ *President of Union Bank vs. Crine*, 21 *Abb. N. C.*, 146. (Holding also that an unnecessary demand of equitable relief may be disregarded; and the pleading stand as an allegation of a legal case.)

Compare *contra*, *Whittenton Mfg. Co. vs. Memphis &*

O. R. Co., 19 *Fed. Rep.*, 273, 281. (Holding that on a bill in equity removed from a State Court, plaintiff cannot proceed at law and recover on allegations of facts constituting a legal cause of action.)

* *Northern Pacif. R. Co. vs. Paine*, 119 *U. S.*, 561.

Whittenton Mfg. Co. vs. Memphis & O. R. Co., 19 *Fed. Rep.*, 273.

* *United States vs. Robeson*, 9 *Pet. (U. S.)*, 319. (Set-off in case arising exclusively under the laws of the United States.)

Mutual Building Fund vs. Bossieux, 1 *Hughes*, 386. (Statute cutting off defence for non-filing within specified time.)

* *Nudd vs. Burrows*, 91 *U. S.*, 426. (Mode of instructing jury.)

* *Dwight vs. Menett*, 4 *Fed. Rep.*, 614. (Summons must be signed by clerk according to *U. S. R. S.*, § 911, notwithstanding State statute allows it to be signed by attorney.)

Turner vs. Newman, 3 *Biss.*, 307. (Special proceeding given by act of Congress to restore lost record, are exclusive of State practice.)

But the State and United States statutes are to be construed to harmonize as far as may be.

State practice it seems may be followed, although it rests only in unwritten usages of the State courts, if consistent with U. S. law and court rules. *Fullerton vs. Bank of U. S.*, 1 *Pet. (U. S.)*, 604, 613.

¹⁰ *U. S. R. S.*, § 914; *Osborne vs. City of Detroit*, 28 *Fed. Rep.*, 385.

Manville vs. Battle Mountain Smelting Co., 17 *Fed. Rep.*, 126.

Rosenbach vs. Dreyfuss, 1 *Fed. Rep.*, 391. (Code rule as to amending of course applies in U. S. Courts.)

¹¹ *Osborne vs. City of Detroit* (above cited).

§ 28. — *as near as may be.*—The provision that the practice is to be “as near as may be” according to the State practice, does not mean as near as possible nor even as near as practicable. The indefiniteness of this language gives the Court power to disregard any subordinate provision of State practice which would unwisely encumber the administration of the law or tend to defeat the ends of justice.

Indianapolis R. Co. *vs.* Korst, 93 *U. S.*, 291, 301
(SWAYNE, J.).

§ 29. *Statutory actions given by common-law names.*—The rule of *U. S. R. S.*, § 914, that “the . . . pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform as near as may be” to those existing at the time in like causes in the Courts of record of the State, applies to an action given by an express statute of the United States in terms describing it as a common-law action,—such as *U. S. R. S.*, § 4919, giving damages for infringement of a patent to “be recovered by action on the case.”

And the pleadings in such action may and should be in the form prescribed by the State statute and rules, except so far as expressly modified by act of Congress, as for instance where the act of Congress prescribes the effect of the general issue, etc.

Teese vs. Phelps, McAll. 17. (Sustaining complaint for damages for infringement of patent, though not in the common-law form for action on the case.)

Celluloid Mfg. Co. vs. Am. Zelonite Co., 34 *Fed. Rep.*, 744. (Holding in an action in N. Y. that the defence should be by answer as under the Code, not by plea as at common law in an action on the case. LACOMBE, J., says: An action on the case in the Federal Courts is assimilated to the Code model except so far as it is modified by express enactment of Congress, as by § 4920.)

s. P., as to verification of pleading in such actions. *Cottier vs. Stimson*, 18 *Fed. Rep.*, 689.

§ 30. *Use and form of demurrers.*—Under *U. S. R. S.*, § 914, providing that the “pleadings and forms of proceeding, in civil causes other than in equity and admiralty, shall conform as near as may be” to those existing at the same time in like causes in Courts of record of the State,—the State statute or general rule of the State Courts

as to what legal defences are to be taken by demurrer, and what by answer, is applicable in the United States Court;¹ and demurrers in actions of a legal nature may be in the same form, and for the same causes, as specified in the State statute or general rule.²

But it is the better opinion that a State statute or rule authorizing State Courts to entertain a formal objection under a demurrer not specifying it, would not authorize the Court to disregard *U. S. R. S.*, § 954, which forbids it to give judgment for defects of form not specified.

¹ *Chemung Canal Bt. vs. Lowery*, 93 *U. S.*, 72. (Holding that a State statute declaring how the defence of the statute of limitations shall be interposed, governs; and so of the decisions of the State Court, that interposing it by demurrer is a sufficient compliance with the provision that it must be interposed by answer.)

² This results from the ruling in *Rosenbach vs. Dreyfuss*, 1 *Fed. Rep.*, 391.

§ 31. *Time of hearing.*—If the practice of the State Court as to time and mode of bringing on a demurrer for hearing is fixed by statute¹ or by general rule of the State courts,² the Courts of the United States sitting in that State hold practitioners bound thereby.

If the State practice is not so fixed, but rests merely on the usage of the Courts, the rule of the Court of the United States, if there be one on the subject, governs.³

¹ *Rosenbach vs. Dreyfuss*, 2 *Fed. Rep.*, 23.

² Dictum in *Osborne vs. City of Detroit* (below cited).

³ *Osborne vs. City of Detroit*, 28 *Fed. Rep.*, 385, 387.

IV.—WHAT KIND OF ALLEGATIONS ARE ADMITTED BY DEMURRERS.

[The general rule that a demurrer admits all material facts well pleaded, is a rule of logic for the purposes of the argument merely. It is not an admission as matter of evidence. That results, if at all, from judgment, or from ultimate failure to answer.¹]

¹ For remarks on the distinction between the admission raised by a demurrer in equity, and at common law, respectively, see *Lamphear vs. Buckingham*, 33 *Conn.*, 237, 251.

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| § 32. Immaterial allegation. | § 36. Fact judicially noticed. |
| 33. General allegation and inconsistent specific allegations. | 37. Prediction. |
| 34. Conclusions of fact which the details do not sustain. | 38. Impossible fact. |
| 35. Fact not alleged. | 39. Damages. |
| | 40. Conclusions of law. |
| | 41. Construction of writing. |

§ 32. *Immaterial allegation*.—Allegations immaterial to the cause of action or defence are not admitted by demurrer.

Laughlin vs. Thompson, 76 *Cal.*, 287; s. c., 18 *Pacif. Rep.*, 330. (Ejectment.)
Story's Eq. Pl., 40. (Stating same rule in equity.)

§ 33. *General allegation, and inconsistent specific allegations*.—A general allegation is not admitted by demurrer, if specific details coupled with it are inconsistent with it, or raise a legal presumption contrary to it.

Scofield vs. McDowell, 47 *Iowa*, 129. (Demurrer to answer which admitted execution of tax deed, but alleged that notice had not been given of the sale.)

[See also § 63 as to *General allegation being limited by specific allegations*.]

§ 34. *Conclusions of fact which the details do not sustain.*—If specific material facts are well pleaded, a conclusion therefrom also alleged is not admitted by demurrer if not supported by the specific facts stated, even though such conclusion if alleged alone would have been sufficient, and admitted by the demurrer.¹ Thus an allegation that one person was agent for another is not admitted if coupled with facts showing that the relation of agent did not exist.²

¹ *Hall vs. Bartlett*, 9 *Barb.*, 297. (Intent of attorney in buying a mortgage with intent to sue, a mere conclusion, where it was alleged that he proceeded to foreclose by advertisement.)

Freeman vs. Hart, 61 *Iowa*, 525. In an action by a surety on an appeal bond to restrain the collection of a judgment entered by mistake for a greater sum than the amount of his bond, an allegation that he had fully performed all obligations incurred under the bond is not admitted by demurrer. Whether the plaintiff had performed such obligations depends on the facts pleaded and not legal conclusions drawn therefrom by the pleader. Judgment reversed.

² *Everett vs. Drew*, 129 *Mass.*, 150.

§ 35. *Fact not alleged.*—It is the better opinion that a fact not alleged is nevertheless admitted by demurrer, if it results by a legal presumption from facts which are well pleaded.

Otherwise if it is only a presumption of fact or inference for a jury.

In other words, a demurrer to allegations of evidence for the jury does not admit the conclusion which the evidence tends to prove.

But a demurrer to allegations of fact which are sufficient for the Court, admits the conclusion which the Court is bound to draw therefrom, even though the conclusion be a conclusion of fact. ,

[The language of the authorities varies as to whether a demurrer admits matters of argument and inference. The reason of the true rule is that to allege and prove facts raising a presumption of law is enough: plaintiff need not give further evidence; why then should he be required to make further allegation?]

[See authorities under §§ 42, 50-52, as to *Facts inferred*.]

§ 36. *Fact judicially noticed*.—An allegation to the contrary of that of which the Court should take judicial notice is not admitted by demurrer.

Taylor vs. Barclay, 2 Sim., 213. (Bill alleging that defendant represented himself to be agent for a foreign State which was "a sovereign State, recognized and treated as such by his majesty," etc.)

[See also § 55, that *Fact judicially noticed* is read unto the pleading.]

§ 37. *Prediction*.—A material allegation as to what will be the future effect of an act is admitted by demurrer, if it is capable of being fairly regarded as characterizing issuably, the nature and scope of the cause from which such effect is apprehended.¹

If it is a statement of mere opinion or apprehension it is not admitted² unless accompanied by issuable facts substantiating its reasonableness.

¹ St. Louis vs. Knapp Co., 104 U. S. 658. (Plaintiff city sought to enjoin defendant from building a runway to its sawmill by driving piles in a part of the Mississippi River bed owned by plaintiff, alleging that such part of the river was used for wharfage purposes by plaintiff, and alleged that the effect of driving piles there would be to divert the water, and create in front of plaintiff's wharf a deposit of mud and sediment, making it impossible for vessels to land there. A demurrer was sustained, the Circuit Court ruling that such allegation of the effect of defendant's proposed action was merely the expression of an opinion or apprehension on plaintiff's part. *Held*, error. Though general, it is a sufficiently certain statement of the essential ultimate

facts on which the claim for relief is based; and it was not necessary to aver circumstances which may be proven in support of the general statement. The demurrer should have been overruled.)

- ² *Bowen vs. Mauzy*, 117 *Ind.*, 258; s. c., 19 *Northeast.*, 526. (Complaint to enjoin nuisance, alleging that defendants intended to erect a blacksmith's shop, etc., and that the gases and smells would be unbearable. Demurrer admits intent to erect, etc., but not—without stating threats or details—the anticipated effects.)

§ 38. *Impossible fact.*—An allegation the truth of which is legally impossible is not admitted by demurrer.

Louisville & N. R. Co. vs. Palmer, 109 *U. S.*, 244.

§ 39. *Damages.*—To a general allegation that the party has sustained damages to a specified amount, a demurrer does not admit any particular amount, but only nominal damages; which however sustains the action.

Lindley vs. Miller, 67 *Ill.*, 244. (The Court say, however, that a special averment, that the damages were equal to or exceeded a particular sum would be traversable.)
Havens vs. Hartford & N. H. R. Co., 28 *Conn.*, 69, 89;
Nolan vs. N. Y., New Haven, etc., R. Co., 53 *Id.*, 462, 477.

[For other cases see DEFAULT and ASSESSMENT OF DAMAGES.]

§ 40. *Conclusions of law.*—A demurrer does not admit a conclusion of law stated in the pleading demurred to,¹ unless it follows from material facts well pleaded.²

- ¹ *City of Buffalo vs. Holloway*, 7 *N. Y.*, 493. (Allegation that by means of a contract, which is set forth, it became the duty of the defendant to perform certain acts, bad on demurrer if the complaint does not state the facts necessary to show the duty.)

Greig vs. Russell, 115 *Ill.*, 483; s. c., 4 *North West. Rep.*, 780. (Bill to redeem, after stating facts of the transaction, alleged that the deed was a mortgage. *Held*, that this conclusion was not admitted by demurrer.)

Stow vs. Russell, 36 *Ill.*, 18. (Specific performance: alle-

gation that one contract was an extension of another, —not admitted. Demurrer never admits matters of law suggested in a bill or inferred from it.)

Compher vs. People, 12 *Ill.*, 290. (Action on official bond: allegation by sureties that, by statutes referred to, their liability was materially changed,—not admitted by demurrer.)

Read vs. Yeager, 104 *Ind.*, 195, 201; s. c., 2 *West. Rep.*, 240. (Allegation that it was “illegal and false,” but not stating facts.)

Lawrence vs. Wright, 2 *Duer* (N. Y.), 673. Ejectment. The complaint averred that certain lots on a date mentioned were “conveyed, by a person named, to plaintiff by a warranty deed; that by virtue of this conveyance plaintiff was seized of the premises, had lawful title thereto, and was entitled to the possession thereof.” *Held*, that as the facts alleged did not show the plaintiff’s legal title, averment of the legal conclusion that he had title should be disregarded, and complaint was bad on demurrer.

Mauney vs. Ingram, 78 *N. C.*, 96. (Action to recover a horse from a bailee. Answer admitted plaintiff’s property, but insisted on defendant’s right to retain the animal until his charges for the care of it were paid. *Held*, a demurrer to the answer did not admit the lien. Judgment overruling demurrer reversed.)

Grace vs. American Cent. Ins. Co., 109 *U. S.*, 278; 27 *Law ed.*, 932. (The jurisdiction of the Circuit Court cannot be supported by averments, in petition for removal, that the parties reside in different States, without averring also that they are “citizens” of such States, although coupled with a subsequent allegation that the controversy is “between citizens of different States,” the latter being merely an unauthorized conclusion of law from the facts previously stated.

Gould vs. Evansville, etc., R. Co., 91 *U. S.*, 526; s. c., 23 *L. ed.*, 416.

Mosher vs. St. Louis, I. M. & S. R. Co., 127 *U. S.*, 390; 32 *L. ed.*, 249.

Pratt vs. Lincoln Co., 61 *Wisc.*, 62; s. c., 20 *North West. Rep.*, 726.

Wallingford vs. Mut. Soc., 34 *Moak’s Eng.*, 65.

Demurrer admits all conclusions of law (whether stated or not) which follow from material facts well pleaded. *Humbert vs. Trinity Church*, 24 *Wend.*, 587.

[As to what are conclusions of law within the rule, see *Rules as to allegations on particular subjects, etc.*, below.]

§ 41. *Construction of writing.*—Where the terms of a writing are pleaded, a demurrer does not admit the construction which the pleader puts upon them, nor the correctness of inferences he draws from them.

Bogardus vs. N. Y. Life Ins. Co., 101 *N. Y.*, 328; *Bonnell vs. Griswold*, 68 *id.*, 294.

s. P., *Morrison vs. North American Ins. Co.*, 69 *Tex.*, 353, 5 *Am. St. Rep.*, 63, 6 *S. W.*, 605. (Statement of legal effect of a policy which is set forth may be stricken out on motion.)

V.—GENERAL RULES (APPLICABLE ON DEMURRER) AS TO THE INTERPRETATION OF ALLEGATIONS.

[These rules, though most frequently invoked on demurrer for insufficiency, are here stated separately, because occasionally applicable to demurrers on other grounds. Other illustrations will be found under the subsequent divisions.]

- | | |
|--------------------------------------------------|------------------------------------------------|
| § 42. Liberal construction of pleading. | § 49. Grammatical ambiguity. |
| 43. Common usages of speech. | 50. Fact necessarily implied. |
| 44. The whole of what is demurred to considered. | 51. Fact not necessarily implied. |
| 45. Inconsistency. | 52. Fact presumed by law from what is alleged. |
| 46. Alternative or equivocal allegation. | 53. Presumption of continuance of fact. |
| 47. Description as an allegation. | 54. Legal fiction. |
| 48. Clerical error. | 55. Matters judicially noticed. |

§ 42. *Liberal construction of pleadings.*—"The allegations of a pleading must be liberally construed, with a view to substantial justice between the parties."¹

Notwithstanding this rule of the New Procedure, it is the better opinion that a pleading is wholly insufficient if a fact essential to be proved is omitted to be alleged;

and that the presumption that a party pleading intends by his pleading to imply all that is essential to its sufficiency will not aid such an omission.²

But a fact is sufficiently alleged if involved by necessary implication in facts which are expressly alleged.³

If an allegation is capable of different meanings, that meaning will be taken, as against a demurrer, which will sust in the pleading, unless it be not a natural or ordinary meaning,⁴ or unless its use may cover an evasive intent.⁵

The meaning of the allegations must be fairly ascertained from the whole pleading, without regard to technical rules.⁶

In the application of these rules some weight is to be allowed to the question whether the missing allegation or qualification is essential to make out a cause of action or a defence, or essential only to the measure of damages or some other collateral point.⁷

¹ This is the usual provision of the codes. In *N. Y. Code Civ. Pro.*, § 519.

United States vs. Parker, 120 *U. S.*, 89, citing *Ferguson vs. Virginia*, etc., R. Co., 13 *Nev.*, 184; *State vs. Central Pacific R. Co.*, 7 *id.*, 99, 103.

In *Ferguson vs. Virginia*, etc., R. Co., 13 *Nev.*, 184, 191, the Court go so far as to say that "The result of the decisions in that State [New York] seems to be that, on a general demurrer, the allegations of a complaint will be construed as liberally in favor of the pleader as, before the code, they would have been construed after the verdict for the plaintiff. That is, they will be construed in such a sense as to support the cause of action or the defence. (*Moak's Van Santvoord's Pl.*, 3d ed., side page 771 *et seq.*) In this State a similar doctrine has been declared in *State vs. Central Pacific Company*, 7 *Nev.*, 103." [This is rather too broad.]

Jackson vs. Jackson, 17 *Or.*, 110; s. c., 19 *Pac. Rep.*, 847.

Fideler vs. Norton (Dak.), 30 *North West. Rep.*, 128.

[PALMER, J., dissented on this point. See opinion in 32 *id.*, 57, reviewing cases.]

Stillwell vs. Hamm, 97 *Mo.*, 579; s. c., 11 *South West.*, 252.

Under the Missouri Code, a pleading should not be construed most strongly against the pleader, but given

an interpretation such as fairly appears to have been intended by its author.

Royce vs. Malony, 58 *Vt.* 437 ; s. c., 5 *Atl. Rep.*, 395, 397. (A pleading clear enough according to reasonable intentment and construction is sufficient on demurrer.)

This rule applies to all defences. *Lewis vs. Barton*, 106 *N. Y.*, 70. (Usury.)

- ² *Spear vs. Downing*, 12 *Abb. Pr. (N. Y.)*, 437, 22 *How. Pr.*, 30 ; 34 *Barb.*, 522. (Leading case). While under the Code pleadings are not to be condemned for the want of form, and are to be liberally construed in favor of the pleader, yet the rule cannot be applied for the purpose of supplying fundamental requisites of a cause of action. Here the action was on a written instrument, set forth in the complaint, by which the defendant's testator promised to pay the plaintiff a sum of money "for her attention to my son." *Held*, such an instrument expressed no consideration, since it afforded no presumption that her services were rendered in pursuance of a previous request of the promisor, or that they were beneficial to him. Order overruling demurrer reversed.

Belt Railroad and Stock-Yard Co. vs. Mann (Ind., 1886), 5 *West. Rep.*, 314. (Allegation of wilful *negligence* not enough where wilful *injury* was needed to be shown.)

Beach vs. Bay State Co., 10 *Abb. Pr. (N. Y.)*, 71, holding, if place is material and the pleading ambiguous as to place, the presumption should be against the party whose pleading it is. Judgment on demurrer reversed.

People vs. Supervisors of Ulster, 34 *N. Y.*, 267. An answer to mandamus for the re-assessment of damages for the laying out of a highway, denied that the verdict of the jurors was certified by a certain named justice of the peace. There was no allegation in the writ that the justice referred to certified the verdict. The Court said : "It might be shown by argument that the pleader intended to deny that the justice who is stated in the writ to have acted in the proceedings by issuing the summons for the jurors, etc., was the justice who certified the verdict. It is not the duty of a Court to resort to an inference or an argument as to the meaning of a bad pleading in order to sustain it on demurrer. Parties are required to make clear and distinct statements in their pleadings. Every intendment on demurrer is against the pleader ; Courts are not to labor to make a better statement for the pleader, on a technical issue of

this kind, than he has made for himself." Judgment sustaining demurrer to reply to answer reversed.

Evans vs. Collier, 79 *Ga.*, 315; s. c., 4 *South West.*, 264.

In *Schwenk vs. Naylor*, 49 *N. Y. Super. Ct. (J. & S.)*, 99, on motion to vacate arrest, the Court say: "The rule is, that allegations which are consistent with there being no cause of action are not to be deemed as tending to show a cause of action;" hence an allegation that defendant represented that he owned all the stock of a specified corporation, which company owned, etc., specified land, "having therein a large and valuable saw-mill, etc.," held, not an allegation that defendant represented that the land had such a mill.

* *McGee vs. Long*, 83 *Ga.*, 156. (Action on notes: plea of usury in original land contract, and the subsequent giving of the notes; but not alleging distinctly that the notes were for the same transaction. Held, error to sustain general demurrer.)

Wagoner vs. Wilson, 108 *Ind.*, 210; s. c., 6 *West. Rep.*, 405. A complaint which avers that the plaintiff advanced and loaned money to and for the use of defendants, and that the defendants "have refused to pay the plaintiff, though often requested so to do," makes it reasonably certain by inference that the sum advanced is due and unpaid.

Shank vs. Teeple, 33 *Iowa*, 189. (Action in equity to set aside a conveyance accepted under representation that title was perfect, but in fact there was a "prior mortgage" in favor of a third person. Error to sustain demurrer for not saying it was recorded.)

Williamson vs. Yingling, 93 *Ind.*, 42. A pleading is sufficient when tested by a demurrer, if the material facts are certainly, although argumentatively and inferentially, alleged. Action for injuries to mill privilege, by damming up the stream. The creek was referred to in the complaint in describing the plaintiff's land on which the mill was situated, and it was averred that defendant's mill was on the creek. Held on demurrer, that the complaint sufficiently showed that plaintiff's mill was on the creek.

Milliken vs. Western Union Tel. Co., 110 *N. Y.*, 403, rev'g 53 *Super. Ct. (J. & S.)*. (Action for damages. The question on demurrer is upon the sufficiency of the facts which may fairly be collected from the pleading considered together with whatever inferences may be drawn from them.)

s. p., *Wall vs. Bulger*, 46 *Hun (N. Y.)*, 346.

Moffatt vs. McLaughlin, 13 *Hun*, 449. (The imperfect averment of a material fact is not cause for demurrer. Where the pleader's intent is apparent, but the phraseology doubtful in effect, the remedy is by motion. Here, in foreclosure, plaintiff averred that the land in question was the only real estate owned in common by defendants instead of by the parties. *Held*, that the allegation was only assailable for uncertainty, since if the allegation was true, the defendants could not hold other lands in common with the plaintiff.)

[*Compare Simmons vs. Fairchild*, 42 *Barb.*, 404. (Count for construction of a will, assuming that it was the last will, etc., of the deceased, bad for not alleging that he was dead. Judgment overruling demurrer reversed.)]

STORY says: "The rule of pleading that every right is to be taken most strongly against the pleader, it was recently decided by Vice-Chancellor Wood, will not entitle the demurring party to any inference to be drawn from a possible state of circumstances consistent with the averments of the bill. All that is now regarded as fairly deducible from this rule of pleading is, that all language used in pleading is to be understood according to its natural import, in the connection, and with reference to the subject-matter; but that in an exact equipoise the construction should be against the pleader, and that no intendments are to be made in favor of the pleader's case which do not naturally result from the facts stated." *Story's Equity Pleadings*, 413.

4 *Allen vs. Patterson*, 7 *N. Y.*, 476. (The complaint stated in substance that defendant was indebted to plaintiffs in a sum for goods sold and delivered, "and that there was now due them from the defendant" a specified sum. *Held*, that under the liberal construction required by the Code, the term "due" must be considered as used to express the fact that the money sought to be recovered had become payable, or the time when it was promised to be paid had elapsed. Where words are employed capable of different meanings, that is to be taken which will support the pleading. Demurrer overruled; judgment affirmed. The Court say: "The maxim in pleading that everything shall be taken most strongly against the party pleading . . . must be received with some qualification, for the language of the pleading to have reasonable intendment and construction; and when a matter is capable of different meanings, that shall be taken which will support the declaration," etc.)

Rathburn vs. Burlington & Missouri River R. Co., 16 *Neb.*, 441. (If the language of a complaint when given its ordinary meaning shows a liability of the defendant to the plaintiff, a demurrer on the ground that the facts stated do not constitute a cause of action should be overruled. Action for injuries sustained by plaintiff caused by defendant's negligence. Judgment on demurrer reversed.)

- ² *Olcott vs. Carroll*, 39 *N. Y.*, 436. (If the language of a complaint is ambiguous, and an intelligible and most natural construction of the words show a good cause of action, such construction should be adopted on demurrer, rather than one which makes the complaint an absurdity. Demurrer properly overruled. Judgment affirmed.)

Pender vs. Dicken, 27 *Miss.*, 252. (The declaration alleged that during the lifetime of the plaintiff's wife, since deceased, the defendant leased the property of the wife from her and the plaintiff, and an action accrued to plaintiff as survivor of his deceased wife for damages occasioned by breach of contract. On demurrer it was objected that the plaintiff sued as survivor, when the demand was in right of his wife. *Held*, as the action was brought two years after the expiration of the lease, and the damage was alleged to be to plaintiff as survivor, it was the fair intendment that she died after the breach of the contract. If the words used in the pleading were susceptible of different meanings that meaning must be adopted which would sustain the pleading.)

- ³ *Winans vs. Insurance Co.*, 38 *Wis.*, 342. (In an action on an insurance policy complaint alleged that the defendant's agent had agreed "at the time of the delivery of the said policy, and thereafter before the fire, as hereinafter stated, that the said premises might be lighted with gasoline gas," etc. On demurrer it was contended that no agreement with the agent was pleaded, but only an unfulfilled promise to plead such agreement; the words "hereinafter stated" referring to the agreement, not the fire. *Held*, such verbal criticism too nice for the construction of pleading. The passage quoted fully stated the agreement; and it was plainly the fire and *not* the agreement which is to be thereafter stated. Order overruling demurrer affirmed.)

- ⁴ *Kelley vs. Peterson*, 9 *Neb.*, 77. (The complaint alleged that the "defendant refused and neglected to cut the plaintiff's wheat, as defendant had agreed and con-

tracted." *Held*, the word "as" here used was equivalent to the word "which"; and the allegation was sufficient to sustain a judgment for the full value of the crop. Judgment overruling demurrer affirmed.)

The general rule of construction is, that if a plea has on the face of it two intendments, it shall be taken most strongly against the party offering it. *United States vs. Linn*, 1 *How. (U. S.)*, 104; 17 *Pet.*, 88. To a declaration on a sealed instrument a plea was interposed that after the instrument had been signed it had been altered without the defendant's consent, by affixing seals to the signatures. *Held*, on demurrer, the plea not alleging by whom the seals were affixed, was left open to two intendments—either that it was affixed by plaintiff or a stranger: in the first case the deed was void, in the latter not; and under the rule stated the latter must be regarded as intended. Judgment reversed, because declaration was insufficient.

* *Nash vs. City of St. Paul*, 8 *Minn.*, 172. (In an action on a contract with a city, which by its charter can only make such contract with the lowest bidder, plaintiff must allege that he was the lowest bidder. An allegation that it was awarded to the plaintiff "as" the lowest bidder is not enough, because the allegation may be literally true, and yet the plaintiff may not have been the lowest bidder in point of fact. Judgment sustaining demurrer affirmed.)

* *Robinson vs. Greenville*, 49 *Ohio St.*, 625. (In an action against a municipal corporation to recover damages for injuries sustained from the discharge of a cannon in a public street by an assembly of disorderly persons, an allegation in petition that the authorities of the corporation "had negligently and carelessly given permission to such persons to fire the cannon" was to be construed with reference to the context, namely, as an allegation that the authorities took no steps to prevent the firing, and that demurrer to petition should therefore be sustained. Judgment affirmed. Court say: "While the common-law rule that pleadings must be construed most strongly against the pleader has been abrogated, we are not required under the present system to construe every equivocal word or phrase most strongly in favor of the pleader.")

* *Roeder vs. Ormsby*, 13 *Abb. Pr. (N. Y.)*, 335; 22 *How. Pr.*, 270. (A complaint by a father, showing that the negligence of defendant's servants caused the death of the plaintiff's child, and "that plaintiff was and will be compelled to pay one hundred dollars for medical at-

tendance, funeral and other expenses caused by the death of his son," is sufficient on demurrer. Though no expenses can be recovered except such as are necessary and reasonable, they need not be so described in the complaint. The "other expenses" mentioned could be ascertained by a bill of particulars or motion to make more definite.)

[See also §§ 35, 36 as to *Facts not alleged*, and §§ 50-52 as to *Facts inferred*.]

§ 43. *Common usages of speech*.—Language used in pleading must be interpreted with reference to the subject-matter to which it is applied.

Language which, literally understood, is inappropriate, may be aided by reading it in the sense in which it is used in common speech.

Murray vs. Worcester Coal Co., 51 *Conn.*,^a 103. (Action by owner and master for damage; allegation that he gave defendant notice that "he desired to be discharged," . . . but "defendant neglected and refused to discharge the plaintiff," etc.; sufficient allegation as to discharging vessel or cargo.)

M'Lellan vs. Morris, Kirby (Conn.), 145. (Holding that a declaration on a promissory note containing the words "use till paid," need not aver the meaning of the words, the obvious meaning being "interest till paid." Judgment on demurrer for uncertainty reversed.)

§ 44. *The whole of what is demurred to, considered*.—On demurrer, pleadings are to be judged by their general scope and tenor, and not by detached and isolated statements thrown into them.¹

In applying this principle, allegations which are improper and unnecessary may nevertheless be considered in the pleader's favor, for the purpose of ascertaining the reasonable intendment of his pleading, when attacked on demurrer.²

¹ *City of North Vernon vs. Voegler*, 103 *Ind.*, 314; s. c., 2 *North Eastern Rep.*, 821, 823 [citing *Neidefer vs. Chastain*,

71 *Ind.*, 363; *W. U. Tel. Co. vs. Reed*, 96 *Ind.*, 195, 198]. (Action for negligence in grading and overflowing plaintiff's premises. Negligence held admitted as distinguished from error of judgment in plan, notwithstanding some fugitive denials.)

- * *Chambers vs. Hoover*, 3 *Wash. Ter.*, 107; s. c., 13 *Pacific Rep.*, 465. (Under the Code, says TURNER, J., "a suitor is no longer to be turned out of court if, by making all reasonable intendments in his favor, enough can be seized hold of in his pleadings to show that he has rights which ought to be enforced. He may be required on motion to conform his statements to the rules of good pleading, and if he refuse, may be turned out of court; but as against demurrer, the office of which is to raise a substantial issue on the law of the case, and not on the law of practice and pleading, evidentiary facts and even inferences from averments amounting to mere conclusions of law will be considered in his favor." Action for forcible entry and detainer: complaint showing that plaintiff by a written instrument in writing, not witnessed or acknowledged, leased the premises to defendant for at least one year and probably longer; that the plaintiff had the option of terminating the tenancy at the end of one year by giving one month's notice; that such notice was given but the defendant refused to vacate,—is sufficient on demurrer although vague and indefinite, as it appears the defendant wrongfully withheld the land even if the lease was for more than one year, and therefore void because not witnessed and acknowledged, as the notice given was sufficient to terminate a tenancy at will.

§ 45. *Inconsistency*.—When a pleading is otherwise sufficient, an inconsistency between allegations is not fatal, if it can be harmonized by construing one of them in the sense in which the pleader must be understood to have used it, supposing him to have intended his pleading to be consistent with itself.

Royce vs. Maloney (Vt., 1886), 2 *N. Eng. Rep.*, 765. (Holding, therefore, that the pronoun "which" was to be referred to the antecedent that made the allegation effective; and that a statement of time might be understood to apply to all of several events alleged in connection.)

s. p., *Rex vs. Stevens*, 5 *East*, 244, 247. (Criminal case ;
Ld. ELLENBOROUGH.)

Brady vs. McCosker, 1 *N. Y.*, 214, aff'g 1 *Barb. Ch.*, 329.
(Bill in equity.)

§ 46. *Alternative or equivocal allegation*.—An allegation in the alternative, or fairly susceptible of either of two distinct meanings, is not bad on demurrer, if it be sufficient in each aspect.¹

But the uncertainty is to be taken most strongly against the pleader, and his case is not stronger than its weakest aspect ; and if, so understood, it is insufficient, it is demurrable.²

¹ *Marie vs. Garrison*, 83 *N. Y.*, 14, rev'g 45 *Super. Ct. (J. & S.)*, 157. (Allegation that plaintiffs hold certain stock, either in their own right or in trust.)

[It may often be otherwise, where the alternative is in the charge against defendant and the frame of the allegation is such that it cannot be justly said that the complaint states the facts constituting the intended cause of action.]

² *The Sir Charles Napier*, *L. R.*, 5 *Prob. D. (App.)*, 73 ; s. c., 28 *Weekly Rep.*, 718. (Allegation that underwriters "paid or agreed to pay," not an allegation of payment. *JESSEL*, M. R., said : "The pleading being in the alternative, the other side were entitled to interpret it most strongly against the pleader.")

Foreman vs. Bigelow, 7 *Centr. L. J.*, 430, *U. S. Circ. Ct. Mass.* (Bill by assignee of a bankrupt corporation to charge shareholders, alleged that there were three classes of shares fraudently issued, but did not specify in which defendant's were. *Held*, that they were entitled to assume that theirs were of the class least open to objection.)

State vs. Casteel, 110 *Ind.*, 174 ; s. c., 11 *North East. Rep.*, 219, 226. (*ELLIOTT*, C. J., says : "Construction of doubtful or uncertain allegations which enables a party to throw upon his adversary the hazard of correctly interpreting their meaning, is no more allowable now than formerly." [Citing *Clark vs. Dillon*, 97 *N. Y.*, 370 ; *Bates vs. Rosekrans*, 23 *How. Pr.*, 98.])

s. p., *Moore vs. Lehman*, 52 *N. Y. Super. Ct. (J. & S.)*, 283. *Slocum vs. Clark*, 2 *Hill (N. Y.)*, 475. (Equivocal plea, at common law.)

§ 47. *Description as an allegation.*—Matter introduced in a pleading merely as descriptive or designatory, with nothing to indicate the time at which it was applicable, is construed as relating only to the time of making the pleading, and does not avail as a distinct allegation where its truth or applicability at a time before suit brought is material.¹

But a descriptive statement connected in point of time with a fact well pleaded is a sufficient allegation,—as for instance, “that defendant, being a common hostler, sold, etc.,” is an allegation that he was such at the time of so selling.²

¹ *Wright vs. Burroughs*, 61 *Vt.*, 390, abst.; s.c., 41 *Alb. L. J.*, 35. (“E. W., husband of said W.,” in the mention of the parties, not an allegation of the existence of marriage before suit, even though there was an allegation that defendant made and delivered the note sued on to the said plaintiff Mary Wright; for her name might have been Wright before marriage.)

[Under the New Procedure the question ought rather to be whether defendant could have been misled by the indefiniteness. But in *Stringer vs. Davis*, 30 *Cal.*, 318, the Court went so far as to hold that an allegation in a complaint to foreclose a chattel mortgage, that the “furniture and upholstery were furnished for and used in furnishing of the hotel in the city and county of San Francisco known as the Willows,” is not an allegation that the goods were used in a hotel, nor that they were used in a building called the “Willows,” nor that the “Willows” was a hotel except inferentially. Defendant’s motion for nonsuit should have prevailed. Judgment reversed.]

In *Roberts vs. Lovell*, 38 *Wisc.*, 211, it was held that where a complaint alleging slander omitted the word “defendant” before “maliciously spoke,” a previous allegation that “when the slanderous words herein-after mentioned were spoken by defendant, plaintiffs were husband and wife,” did not amount to an allegation that defendant spoke them, even for the purpose of letting in evidence at the trial. [These two rulings may be sustainable on common-law traditions, but are not in accordance with Code practice.]

[An exception is recognized in equity, in the description of parties usual in the introductory clause, and the prayer for process when the question is whether jurisdiction is shown. See *Demurrer for want of jurisdiction.*]

- ² *Johnson's Case*, 2 *Cro. Jac.*, 610. (Indictment good.)
 s. p., *Harle vs. Morgan* 29 *S. Car.*, 258; s. c., 7 *South East. Rep.*, 487. (A complaint the caption of which mentions the individual names of the defendants and describes them as "partners trading under the firm name and style of A. J. Morgan & Co.," and alleging that "defendants, the said firm of A. J. Morgan & Co., executed" their written obligation, sufficiently alleges the partnership of the defendants, and is good on demurrer.)
 s. p., *Parker vs. Monteith*, 7 *Oreg.*, 277. (Seduction. Allegation that "one F., the daughter of plaintiff, was," etc., sufficiently avers for the purpose of admitting evidence that F. was his daughter, being equivalent to "one F., who is the daughter.")

§ 48. *Clerical error*.—An obvious clerical error, such as ought not to have misled the adverse party, should be disregarded on demurrer, whether it consists merely in a discrepancy or incongruity between different parts of the pleading,¹ or the omission of a necessary word which the context suggests,² or the insertion or substitution of a word³ even though it reverses the meaning obviously intended.

This rule is applied as well to the pleading of a defendant⁴ as to that of a plaintiff; because if plaintiff wishes a more explicit answer he should seek amendment.

¹ *Atkins vs. Warrington*, 1 *Chitt. Pl.*, 16 *Am. ed.*, 273 *. (One thousand eight and twenty-six, "read one thousand eight hundred and twenty-six;" and special demurrer overruled.)

² 1 *Chitt. Pl.*, 16 *Am. ed.*, 253. (Use of "defendant" in place of "plaintiff.")

Wood vs. Decoster, 66 *Me.*, 542. (A demurrer will not be sustained merely for erroneous mention of the defendants as singular, or the plaintiff as plural, if, upon the declaration as a whole, the persons and case can be understood.)

Chamberlin vs. Kaylor, 2 *E. D. Smith (N. Y.)*, 134. (Where a complaint, entitled against two defendants consisted of a printed form, with the blank spaces filled in writing, alleged a sale of goods "to the defendant,"—*held*, the omission of the letter "s," being apparently a clerical error, should be disregarded on demurrer and

- the allegation deemed to charge both defendants. Order overruling demurrer affirmed.)
- McCarron vs. Cahill**, 15 *Abb. N. C.*, 282; s. c., 1 *How. Pr. (N. S.)*, 305. (A complaint, alleging in one paragraph facts showing a cause of action for piece of work done and materials furnished, is not demurrable for insufficiency by reason of a second paragraph alleging that no part of the same has been "furnished," instead of "paid." The defect is a technical one, a clerical error, which does not nullify the former allegations, under the rule requiring pleadings to be construed with a view to substantial justice between the parties.)
- Fickett vs. Brice**, 22 *How. Pr. (N. Y.)*, 194. The complaint first alleged that the defendant agreed to manufacture and deliver certain goods "at the price of \$475," and further alleged that "plaintiff agreed to pay the defendant therefor the sum of \$470." *Held*, the discrepancy was probably a clerical error, and could not sustain a demurrer.)
- * **Baldwin vs. Banks**, 20 *Ill.*, 48. (Action on a note, omitting from the clause where the averment of non-payment was intended the word "not," and therefore saying "defendant, disregarding, etc., hath paid," etc., instead of "hath not paid." *Held*, that the omission was cured by the statute of "jeofails;" and if it were not, where the sense is so obvious from the words used, the declaration must be held good.)
- Cummings vs. Lebo**, 2 *Rawle (Pa.)*, 23; s. c., 19 *Am. Dec.*, 615. (Allegation that a bond was conditioned that defendant should not appear, instead of that he should appear; amendable below, and disregarded on appeal.)
- Newcomer vs. Kean**, 57 *Md.*, 121, abst.; s. c., 25 *Alb. L. J.*, 263. (Plaintiff instead of plaintiffs, in laying damages in declaration by husband and wife for slander of wife, not ground for setting aside verdict.)
- Marshall vs. Bresler**, 1 *How. Pr. N. S. (N. Y.)*, 217. (Mistake of ten years in date of document as appearing in copy of complaint served, not ground of demurrer.)
- [**In Chambers vs. Robbins**, 28 *Conn.*, 544, 550, an illegible word in the original represented by a mistaken word in the copy was held equivalent to an omission of a necessary word.]
- * **Indiana, B. & W. R. Co. vs. Dailey** (*Ind.* 1887), 8 *West. Rep.*, 517. (Allegation that plaintiff was injured by the negligence of an "engineer in plaintiff's employ," instead of in defendant's, *held* harmless as "so apparently only an accidental misnaming of a party that no one could be misled by it.")

Kenny vs. N. Y. Centr., etc., R. R. Co. 49 *Hun* (N. Y.), 535. (Action by administratrix for causing death of intestate: allegation that "said defendant [instead of said decedent] left him surviving his widow," etc., etc., *held*, an obvious clerical error that could not have misled and should be disregarded.)

Roussell vs. St. Nicholas Ins. Co., 41 *Super. Ct.* (J. & S.), 279; s. c., 52 *How. Pr.*, 495. (Complaint on insurance policy, alleging that the fire was not caused by any of the "accepted risks" contained in the policy, instead of "excepted risks.")

* Fears vs. Albea, 69 *Tex.*, 437; s. c., 5 *Am. St. Rep.*, 79, 6 *S. W.*, 286. (Holding that the writing of a wrong name in a plea is immaterial when, from an inspection of the entire plea, it is manifest that it was so written through mistake, and it is obvious what name was intended, without looking beyond the plea itself; for in such case if the party is misled, it is by his own carelessness.)

§ 49. *Grammatical ambiguity.*—Whether a personal pronoun shall be understood as referring to the immediately preceding substantive or to an earlier one is a question of interpretation to be determined by the apparent intent, although it may be contrary to the grammatical construction.

Thus the words, "the plaintiffs, complaining of the defendants, allege that they are," etc., is to be interpreted as alleging that the defendants are or that the plaintiffs are, whichever may be necessary to sustain the pleading.

Steeple vs. Downing, 60 *Ind.*, 478. (In an action to recover land, the complaint commenced by stating that plaintiffs, naming them, "complain of the defendants," naming them, "and say *they* are the owners." *Held*, there is no rule of legal or grammatical construction which necessarily requires that a pronoun shall relate to the last noun or nouns mentioned for its antecedent. This is a matter which is governed by the sense and meaning intended to be conveyed. The word "they" as above used related to the plaintiffs and the complaint was good.)

Moore vs. Beem, 83 *Ind.*, 219. (The complaint stated that "plaintiffs complain of the defendants and say *they* are partners," etc. *Held*, the personal pronoun referred to

the plaintiffs, and demurrer to complaint was properly overruled. Judgment affirmed.)

§ 50. *Fact necessarily implied.*—Whatever fact is necessarily implied in an allegation of fact, so that the latter could not in a legal sense be true without the former, may, on demurrer, be deemed to be sufficiently alleged although not expressly stated. Thus an allegation of a refusal to exchange though often requested, implies an offer and ability to give the thing called for by the requested exchange;¹ an allegation that a married woman was owner of stock in a corporation implies that she had capacity to hold it;² and an allegation that an act was done implies the existence and use of the essential means for doing it effectually.³

But facts necessarily implied in an allegation of a conclusion of law are not sufficiently alleged thereby,⁴ because an allegation of a conclusion of law is itself insufficient.

Marie vs. Garrison, 83 N. Y., 14, 28, rev'g 45 *Super. Ct. (J. & S.)*, 157. (ANDREWS, J., says: "What is implied in an averment is on demurrer to be taken as if the thing implied is directly averred; and an argumentative pleading is not for that reason demurrable.)

¹ *Bundy vs. Cocke*, 128 U. S., 185; s. c., 32 L. ed., 396; 16 *Wash. L. R.*, 810, 9 *Supm. Ct.*, 242, 5 *R. R. & Corp. L. J.*, 346. (So held in an action against her for an assessment on the stock.)

² *Sac County vs. Hobbs*, 72 *Iowa*, 69; s. c., 33 *North West. Rep.*, 368. (Allegation that note by defaulting outgoing county treasurer was delivered on agreement that it should take the place of his bond, implies that the agreement was with the board of supervisors, for no others had authority to so agree.)

Partridge vs. Badger, 25 *Barb.*, 146. (Allegation in a complaint that certain drafts were accepted by a corporation, by their treasurer, includes an averment of authority to the treasurer to accept the drafts; inasmuch as the company could not accept by him unless he had such authority. What is necessarily understood, or implied in a pleading, forms part of it as

much as if it were expressed. [Citing 7 *N. Y.*, 478; *Steph. on Pl.*, 220; 1 *Chitt. Pl.*, 640; 2 *Camp.*, 604; *Chitt. on Bills*, 585.]

Nelson vs. Eaton, 26 *N. Y.*, 410; s. c., 16 *Abb. Pr.*, 113; rev'g 7 *Abb. Pr.*, 305, and aff'g 15 *How. Pr.*, 305; and holding that in an action by an assignee of assets of a corporation, if the transfer to him can be presumed legal, the complaint need not aver the directors, by resolution, authorized the assignment, as prescribed by statute.

s. p., *Frets vs. Frets*, 1 *Cow. (N. Y.)*, 335. A plea to the declaration on a bond for performance of an award, that the defendants, by a writing under seal, revoked the power of the arbitrators before the award was made, need not aver notice to the arbitrators or the opposite party; for without notice the deed could not have amounted to a revocation.

Syfers vs. Bradley, 115 *Ind.*, 345, 15 *West.*, 306; s. c., 17 *N. East.*, 619. (Holding that an allegation that a chattel mortgage was in due time recorded in the proper office implies that it had been first duly acknowledged for record.)

Roberts vs. Wabash, etc., Ry. Co. (Mo., 1886), 3 *West. Rep.*, 783. (So held, dispensing with an allegation that a charter had been accepted, because the complaint alleged that the company had succeeded to the rights, privileges and immunities, and become bound by the liabilities of its predecessor.)

* *Hofheimer vs. Campbell*, 59 *N. Y.*, 274. (The omission to allege a necessary fact cannot be supplied by presumption even where the legal conclusion is alleged. If any presumption arises, it is against the existence of the fact not alleged, because we may infer that the party stated his case as favorably as possible for himself. CHURCH, Ch.J.)

[But in *People ex rel. Crane vs. Ryder*, 12 *N. Y.*, 433 (action in the nature of *quo warranto*), where the complaint alleged that an election was legally held pursuant to statute for the election of a county judge, to discharge the duties of said office from the first day of January, 1852, for the term of four years,—held, under the liberal construction of pleadings required by the Code, a sufficient allegation of the time when the election was held, since it necessarily imported that the election was held on the day fixed by statute, of which the Court would take judicial notice. Judgment sustaining demurrer reversed.]

[See also § 35, as to *Fact not alleged*; and § 42, as to *Liberal construction*.]

§ 51. *Fact not necessarily implied*.—On the other hand, a fact not necessarily implied, although inferable, is not sufficiently alleged, by alleging the fact which suggests it. Thus alleging that a board of officers rejected an account because of fraud or mistake is not an allegation of the existence of fraud or mistake on their part;¹ and alleging that trustees refused to comply with a demand for a statement of account, does not imply that the refusal was wrongful, for they may have shortly before furnished such an account.² But an allegation that the adverse party represented a material fact to exist may suffice as against that party, in place of an allegation of the existence of the fact.³

¹ *Patten vs. State, McCann*, 117 *Ind.*, 585; s. c., 19 *North East.*, 303. (Mandamus.)

s. p., *Williams vs. Ins. Co. of N. A.*, 9 *How Pr. (N. Y.)*, 365. (Allegation of furnishing proof of interest not equivalent to an allegation of the necessary interest to satisfy the statute against wager contracts.)

Fowler vs. N. Y. Indemnity Ins. Co., 26 *N. Y.*, 422, rev'g 23 *Barb.*, 143. (Allegation of lawful ownership of policy and claim thereon not equivalent to alleging insurable interest.)

² *Magauran vs. Tiffany*, 62 *How. Pr. (N. Y.)*, 251. (VAN VORST, J. holding that a pleading cannot be sustained upon implications unless they of necessity follow from what has been alleged.)

Coster vs. Isaacs, 16 *Abb. Pr. (N. Y.)*, 328; s. c., 1 *Robt.* 176. (That married woman who carried on a separate business represented that the contract was made for its use.)

§ 52. *Fact presumed by law from what is alleged*.—If a party has alleged all that he is required to prove in order to establish his case, omission to allege facts which are presumed therefrom as matter of law is not ground of demurrer if the presumption be conclusive.¹

And it is the better opinion that the same rule should apply, though the presumption be not conclusive, if it be a legal presumption, such as it would be error to disregard on proof of the facts which have been alleged.

[This is not so much a rule of pleading (although the language of many of the cases so treats it), as a reason for disregarding a formal defect when the matter not fully alleged is unquestionably implied. In the application of this reason consideration may be due to the question whether the fact is directly or only collaterally involved, by the use which the pleader seeks to make of it; and also whether the action or defence is penal in its nature.]

For conflicting cases see *McCormick vs. Pickering*, 4 *N. Y.*, 276. (Presumption of regularity of proceedings; and that paper alleged to have been filed and proceeded on was presented to the Court.)

Jenkins vs. Van Schaack, 3 *Paige (N. Y.)*, 242. (Allegation of seizin in common, in partition, implies possession.)

Addington vs. Allen, 11 *Wend. (N. Y.)*, 374; rev'g 7 *id.*, 9. (Holding that at common law the facts which will after verdict be presumed to have been proved are those which, though entirely omitted to be stated in the complaint, are so connected with the facts alleged that the facts alleged cannot be proved without proving the facts not alleged.)

Whitehouse vs. Moore, 13 *Abb. Pr. (N. Y.)*, 142. (Holding that since one who employs a broker is presumed to deal with reference to the custom of brokers, whether known to him or not, it is unnecessary in a complaint by a broker against his principal, to allege the latter knew of the existence of a custom on which the action is founded.)

Tileston vs. Newell, 13 *Mass.*, 406. (Where, in contemplation of building a dam, it was covenanted that a new mill should be conveyed to the plaintiff within sixty days after the old mill had stopped,—*held*, that an averment in a declaration on such agreement that a dam was built below the old mill sufficiently showed that the old mill had been stopped, since it was a necessary inference that the water was prevented from passing above it. Demurrer overruled.)

Lee vs. Ainslie, 4 *Abb. Pr. (N. Y.)*, 463. (In an action against maker and endorser of promissory note, the complaint contained an averment that the note for

value received lawfully came to the possession of these plaintiffs. *Held*, a sufficient averment of title in plaintiff. Demurrer frivolous; order affirmed.

Foulks vs. Foulks, 6 *N. Y. Supp.*, 112. (In an action for a legacy, an allegation that the will was proved three years before suit implies, as against demurrer, that letters were issued at the time.)

Cowper vs. Theall, 4 *N. Y. State Rep.*, 674; s. c., 26 *N. Y. Weekly Dig.*, 73. (Holding that performance on the plaintiff's part of delivery by him, made a condition in the contract on which he sues, is sufficiently alleged if plainly inferrible from other allegations, as that the thing was in defendant's possession.)

DANIELS, J., said: "An argumentative, or inferential, averment is permitted by the practice unless a motion be made more for an order requiring the complaint to be made more definite and certain, and whatever may be inferred logically and directly from the complaint is, in judgment of law, contained in it."

Chambers vs. Hoover, 3 *Wash. T.*, 107; s. c., 13 *Pacif. Rep.*, 466. (Forcible entry and detainer. TURNER, J., says: "As against a demurrer, the office of which is to raise a substantial issue on the law of the case, and not on the law of practice and pleading, evidentiary facts, and even inferences from averments amounting to mere conclusions of law, will be considered in the pleader's favor.")

Earnmoor vs. California Ins. Co., 40 *Fed. Rep.*, 847. (Admiralty: seaworthiness being presumed need not be alleged. BROWN, J., says: "The primary rule in pleading is that what must be averred must be proved; and conversely, that what the law presumes and need not be proved, need not be averred; also, that the plaintiff need not aver what more properly comes from the other side. 1 *Chitt. Pl.*, *221, *222. When, then, it is determined that no proof of seaworthiness need be given, all reason for requiring an averment of seaworthiness in the libel disappears. The defendant, if he wishes to raise that issue, can do so by his answer with equal convenience, and more properly; and this rule, in admiralty practice, tends to simplify the pleadings, to dispense with needless technicalities, and to promote certainty as to the real issues intended to be tried. All the references in adjudged cases to the need of averring seaworthiness proceed upon the supposed need of supplying some *prima facie* evidence of it. When the legal presumption dispenses with such proof, it should be held to dispense with the averment also; and, as I have said, this rule is a desirable and beneficial one in prac-

tice." [Citing *Guy vs. Insurance Co.*, 30 *Fed. Rep.*, 695.]

Botsford vs. Dodge, 65 *How. Pr. (N. Y.)*, 145. (Action on individual liability: an allegation that the corporation is duly organized and existing, does not thereby sufficiently imply the existence of any number of trustees, although the statute requires three or more.) [*Contra*, *Lorillard v. Clyde*, 86 *N. Y.*, 384.]

- 1 *Chitt. Pl.*, 16 *Am. ed.*, 411. (Saying: "It does not appear necessary to state the formal description of damages in the declaration, because *presumptions of law* are not in general to be pleaded or averred as facts. Therefore, though it is usual, in an action on the case for calling the plaintiff 'a thief,' to state that by reason of the speaking of the words the plaintiff's character was injured, yet that statement appears unnecessary, because it is an intendment of law that the plaintiff was injured by the speaking of such words." [Citing *Hutchinson vs. Granger*, 13 *Vt.*, 386.])

Maguiar vs. Henry, 84 *Ky.*, 1, 12; s. c., 4 *Am. St. Rep.*, 182. (Presumption that officer did his duty; and statute shifting burden to prove omission, upon defendant, does not supply omission of one pleading a tax title, to allege assessment, and preliminary steps to be valid sales.)

[The reason assigned is that the statute as to pleading requires the facts constituting the cause of action stated.]

In applying this rule it should be remembered that the presumption that the pleader intended to state a sufficient case, although it will aid interpreting an ambiguous allegation in a sense favorable to his case, will never supply an omitted allegation.

§ 53. *Presumption of continuance of fact.*—The rule that a fact shown once to have existed is presumed to have continued until the contrary is shown, is a rule of evidence and not of pleading; and where the specific time of a fact is material, an allegation that it existed at a previous time is not made sufficient by that presumption.

Wilkinson vs. Dobbie, 12 *Blatchf.*, 298, 301. (WALLACE, J.: "Facts must be specifically stated, and conclusions upon inference or argument are not tolerated.")

People vs. Fadner, 10 *Abb. N. C.*, 462. (Criminal case. To an indictment for usury the defendant interposed a

special plea that a witness before the grand jury was married and became the wife of the accused on a day named (which was a day previous to the finding of the indictment), and after such marriage the accused lived and cohabited with her as his wife. *Held*, bad on demurrer.)

Contra, Van Rensselaer vs. Bonesteel, 24 Barb. (N. Y.), 365. (In an action to recover rent by an assignee, the complaint is not defective on demurrer in omitting to allege that after the plaintiff became assignee of the rent he continued to be such owner until suit was commenced. In absence of any allegation to the contrary this is the legal presumption and need not be alleged or proved.)

Stroebe vs. Fehl, 22 Wis., 337. (Holding that when the law presumes a fact,—as, that a husband and wife who were alive two years ago are still living,—it need not be stated in pleading. Complaint having been dismissed at trial for insufficiency, the judgment was therefore reversed.)

Dunning vs. Ower, 14 Mass., 157. [In an action on judgment it was objected that the defendant's plea, alleging execution by the commitment of the debtor, did not show discharge or satisfaction of the debt. *Held*, that the legal presumption was that the defendant still remained in prison, and the plea was sufficient in this respect. Judgment for plaintiff on demurrer to subsequent pleading.]

[This ruling may rest on the principle that satisfaction at any time is in itself a bar; and therefore the principle stated in the text is not impugned, it being for defendant to show a renewal of the obligation.]

§ 54. *Legal fiction*.—Under a statute declaring that a specified fact shall be deemed another fact, or that the latter shall be presumed from the former,—as that a written and unconditional promise to accept a bill before it is drawn shall be deemed an actual acceptance in favor of one purchasing on its faith,¹ or that payment of a judgment shall be presumed from the lapse of twenty years,²—it is not necessary in equity, nor under the New Procedure, to allege the fact presumed, but the pleader may allege the actual fact, which by force of the statute is equivalent to it.

¹ *Barney vs. Worthington*, 37 *N. Y.*, 112; s. c., 4 *Abb. Pr. N. S.*, 205. (1 *R. S.*, 768, § 10. The objection taken was that the complaint was insufficient to uphold the judgment.)

² *Malloy vs. Vanderbilt*, 4 *Abb. N. C.*, 127, 133. Holding to the rule stated in the text as the rule in equity, but citing *Henderson vs. Henderson*, 3 *Den.*, 314, as to the contrary at common law. s. p., *Walden vs. Craig*, 14 *Pet. (U. S.)*, 147.

[Under the New Procedure a party has the *right* always to state the actual facts, and to omit to state any fiction which he cannot swear to the truth of, as a fact.]

In *Miner vs. Beekman*, 50 *N. Y.*, 337, 344, the contrary was indicated in a dictum in an equity case, but the point does not seem to have been much considered, and the error has been corrected by *N. Y. Code Civ. Pro.*, § 378, expressly making the presumption available under an allegation of a lapse of time.

§ 55. *Matters judicially noticed.*—It is not necessary that matters of which the Court should take judicial notice should be alleged in pleading; and on demurrer a pleading is to be read as if such matters were stated therein.

Walsh vs. Trustees of New York & Brooklyn Bridge, 96 *N. Y.*, 427. (Public statutes may be read as if embodied in the complaint.)

State, Campbell, vs. St. Louis Ct. App., 97 *Mo.*, 276; s. c., 10 *South West. Rep.*, 874. (To raise a constitutional question, a pleading need not set out the sections of the Constitution, nor refer to them by numbers.)

[See also § 36.]

[As to what the Court may judicially notice, and the rule of United States Courts, see *Brief on the Facts*, p. 142, § 383, and particular subjects in *Index* there, p. 295.]

GENERAL RULES, APPLICABLE ON DEMURRER, AS TO THE FRAME AND SUFFICIENCY OF ALLEGATIONS.

[These rules, though most frequently invoked on demurrer for insufficiency, are stated here because occasionally applicable under demurrers assigning other grounds.]

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| <p>§ 56. Directness of allegation.</p> <p>57. — technical words not necessary.</p> <p>58. — information and belief.</p> <p>59. — recital—"whereas."</p> <p>60. — videlicet.</p> <p>61. Objection to mode of statement not available.</p> <p>62. Generality.</p> | <p>§ 63. General limited by specific allegations.</p> <p>64. General averment of negative.</p> <p>65. Indefiniteness and uncertainty.</p> <p>66. — sometimes fatal.</p> <p>67. Omission of formal allegation required by rule of Court.</p> <p>68. Mixed question of law and fact.</p> |
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§ 56. *Directness of allegation.*—An allegation must be, in form or in substance, a direct statement of the matter necessary to be presented.

A statement is bad on demurrer if so framed as to evade the responsibility of a direct allegation; such as stating a fact with the qualification "as it was alleged"¹ or, plaintiffs "have heard and so charged,"² or that "defendant will prove the following facts," etc.³

But a direct allegation otherwise sufficient is not rendered bad on demurrer by adding a reference to public records or competent documentary evidence, as by alleging that the fact is so and so, as "is shown by" such documents.⁴

¹ *Byington vs. Saline County*, 37 *Kans.*, 654; s. c., 16 *Pac. Rep.*, 105. (The allegation here was, "said money, as it was alleged, not then being in the county treasury, but having been, by the acts and order of the board of county commissioners and county treasurer, appropriated and paid out and expended by and for said county of Saline." *Held*, bad on demurrer. The Court said:

"It devolved on the plaintiff to state facts, and not a mere matter of hearsay which some one else may have regarded as a fact."

² *Williams vs. First Presb. Soc.*, 1 *Ohio St.*, 478, 504. (Suit in chancery.)

Egremont vs. Cowell, 5 *Beav.*, 620. (Bill to redeem stating, as an excuse for not joining representatives of deceased joint lender, "that the defendant G. alleged, and plaintiff believed the fact to be, that" the money was lent by the two as trustees, and plaintiff was advised that the right to the money survived to G.)

³ *Lewis vs. Kendall*, 6 *How. Pr. (N. Y.)*, 59, 64; s. c., 1 *Code R. N. S.*, 402. (Statement that "defendant will prove on said trial in justification the following facts and circumstances, that is," etc., *held*, not an issuable allegation.)

[So far as this case held that defendant cannot avoid without confessing, it must be deemed overruled.]

Ashbey vs. Ashbey, 41 *La. Ann.*, 102; s. c., 5 *So.*, 539. (An averment by the pleader that, in the same matter, between the same parties, but in a former suit and in another court, he had pleaded prescription, is not sufficient as a plea in the present case.)

⁴ *Boyer vs. Boyer*, 113 *U. S.*, 689, 701. (Action to enjoin tax commissioners from levying an unequal tax. Several of the material allegations were expressed thus: "That for the year 1881, as is shown by the public report and the books of the auditor-general of Pennsylvania, the sum of," etc. "That it appears, as is shown by the books and published report of the secretary of internal affairs for the year 1881, that the total valuation," etc. "That for the same year, as is shown by the books and published reports of the auditor-general, a tax was paid into the state treasury," etc. *Held*, error to sustain demurrer. The demurrer, of course, admits these allegations of fact to be true. Their materiality is not affected by the circumstance that they are stated to appear, also, upon the books and published reports of the auditor-general and the secretary of internal affairs of Pennsylvania.)

§ 57. — *technical words not necessary.*—The word "alleges" or "avers" is not essential.¹ But language which imports opinion rather than assertion of fact is wholly insufficient.²

¹ *Johnson vs. Helmstaedter*, 30 *N. J. Eq.*, 124. (A pleading is sufficient on general demurrer, although the word "charge" is used, if it is evident that the pleader intended to "allege" or "aver" the fact.)

² *Carter vs. Lyman*, 33 *Miss.*, 171.

§ 58. — *information and belief*.—A direct allegation of a fact may be expressed to be made "upon information and belief;" ¹ and is not on that account bad on demurrer even when the fact so stated may be presumed to be within the personal knowledge of the party pleading.²

At Common Law and in Equity,³ an allegation that the party is informed,⁴ or that he is advised and believes,⁵ or is informed and believes,⁶ or even that the adverse party alleges and the party pleading believes' the fact to be so and so, is bad on demurrer.

Under the New Procedure the uncertainty resulting 'from using such informal statements, instead of a direct statement upon information and belief, is not regarded as ground for demurrer.⁶

And an allegation which is in itself direct, is not rendered bad on demurrer by being introduced by a statement of information and belief with the words "and he therefore alleges."⁷

¹ *Lucas vs. Oliver*, 34 *Ala.*, 626 (below cited).

Leavenworth vs. Pepper (*C. Ct., E. D. Mo.*), 32 *Fed. Rep.*, 718.

² *N. Y. Marbled Iron Works vs. Smith*, 4 *Duer* (*N. Y.*), 362. (*Held*, that a motion to dismiss was properly denied.)

³ *Lord Uxbridge vs. Staveland*, 1 *Ves.*, 56. (Bill to discover an assignment of a lease, stated that the plaintiff had been informed that defendants were assignees of a lease wherein there was a covenant that the lessees should grind all their corn at plaintiff's mill. *Held*, bad on demurrer on the ground that plaintiff had not charged that defendants were assignees: it was not sufficient to allege that plaintiff had been informed that defendants were assignees, but that fact must be positively averred, as in a declaration at law.)

S. P., *Story's Eq. Pl.*, 251.

* *Cameron vs. Abbott*, 30 *Ala.*, 416.

* *Jones vs. Cowles*, 26 *Ala.*, 612. (Allegation that complainant is advised and believes that defendant did, etc., is not enough. Bill dismissed.)

* *Lucas vs. Oliver*, 34 *Ala.*, 626. (An allegation that complainant "is informed and believes" that a certain material fact exists, is not equivalent to an averment of the existence of that fact; but an averment of the existence of the fact, "as complainant is informed and believes," is sufficient. Where the equity of a bill rests on the existence of one of two facts, which are stated disjunctively, and one of which is not sufficient to uphold the bill, the averment is insufficient.

* *Egremont vs. Cowell*, 5 *Beav.*, 620; *Story's Eq. Pl.*, 243.

* *Stoutenburg vs. Lybrand*, 13 *Ohio St.*, 228. Under §§ 85, 92, 114 of Ohio Code, providing that allegations of a pleading are to be expressed in ordinary language and to be liberally construed, an objection that the defendant pleaded that "he is informed and believes" the facts alleged, cannot be raised by demurrer; the proper remedy is a motion to strike out. Judgment reversed.

Howell vs. Fraser, 6 *How. Pr. (N. Y.)*, 221.

Bement vs. Wisner, 1 *Code R., N. S. (N. Y.)*, 143.

Radway vs. Mather, 5 *Sandf. (N. Y.)*, 654. (In the three foregoing cases the allegations were that the party believes, etc.)

Fry vs. Bennett, 5 *Sandf.*, 54; s. c., 9 *N. Y. Leg. Obs.*, 330; less fully 1 *Code R., N. S.*, 238. (Allegation of fact, adding "as the defendant has been informed and believes.")

* *Wells vs. Bridgeport, etc., Co.*, 30 *Conn.*, 316, where an allegation that the petitioner "is informed and verily believes, and thereupon avers," etc., was held a direct and positive averment.

Borrowe vs. Milbank, 5 *Abb. Pr. (N. Y.)*, 28.

Davis vs. Potter, 4 *How. Pr. (N. Y.)*, 155; s. c., 2 *Code R.*, 99.

[*Contra*, *Exp. Reid*, 50 *Ala.*, 439. (Application for prohibition, alleging that complainant is informed and believes, and therefore states, not sufficient.)]

So an allegation that certain representations set forth were "false, as deponent has since learned," may be regarded as a positive allegation of falsity, and not on information and belief. *Cummings vs. Woolley*, 16 *Abb. Pr.*, 297, *note*.

McKinney vs. Roberts, 68 Cal., 192; s. c., 8 Pacif. Rep., 3. (Slander. Allegation that, as plaintiffs are informed and believe, defendant spoke, etc. Error to sustain demurrer.)

§ 59. — *recital*; “*whereas*.”—In general, a statement of necessary facts, constituting a part of the cause of action, as distinguished from a matter of inducement, if not made directly but by way of recital, is bad on demurrer. But this rule does not apply, either to the promise or the consideration, in a common count in assumpsit.¹

Matter of inducement may be stated parenthetically or introduced by “*whereas*.”²

¹ Sheppard vs. Peabody Ins. Co., 21 West V., 368; s. c., 12 Ins. L. Jour., 817. GREEN, J., says: “It is unquestionably true that it is a general rule of pleading that whatever facts are necessary to constitute the cause of action should be directly and positively stated in the declaration, and not by way of recital; but though this rule be apparently violated, it has been expressly decided by this court that if in assumpsit, in the common indebitatus count, the promise is stated after a *whereas*, though the promise is the very gist of the action, yet such a count so framed will be held good on demurrer. See Burton & Co. vs. Hansford, 10 W. Va., 470. This conclusion was reached because this was the manner in which the judges of England had prescribed for such a count in an action of assumpsit; and they decided that such a mode of stating the promise in such a count was good, independently of their having prescribed this as its proper form. And while the Virginia courts had repeatedly sustained demurrers in other forms of action, because necessary facts were not stated in the declaration positively, but by way of recital, as after a *whereas*, yet they had never held that a demurrer to a count in a declaration in *indebitatus assumpsit* would be defective because the promise was stated after a *whereas*. . . . As the promise is the very gist of the action of assumpsit, it would seem to follow that if we permit it to be thus stated after a *whereas*, we could not consistently hold that in such a count the consideration could not be stated after a *whereas*; es-

pecially when the forms of common counts, as prescribed by the English judges, not only stated the promise after a whereas, but also the consideration." [Citing *Rob. Forms*, 550, 551, 554.]

At common law, it is sufficient in a declaration to allege a deed or other instrument, by way of recital, though in a plea it is not. *Wells vs. Query*, *Litt. (Ky.)*, *Sel. Cas.*, 210; 1 *Chitt. Pl.*, 16 *Am. ed.*, 309, 310.

* 1 *Chitt. Pl.*, 16 *Am. ed.*, 296.

§ 60. — *videlicet*.—A *videlicet* cannot increase or diminish the intrinsic significance of the preceding matter, but may limit the application thereof, by showing the meaning of words used there.

If it is repugnant in substance to the preceding matter it must be rejected as surplusage.

If it merely particularizes what was general, in the words preceding, they may be construed together.

State vs. Brown, 51 *Conn.*, 1. (Allegation of sale of "spirited liquor, to wit, . . . beer." Held good, as an allegation of a sale of intoxicating beer.)

[The old illustration is,—to say "his heirs, viz., heirs of his body," is good; but to say "all his land in A., viz., two acres," when he has three, will pass the three.]

§ 61. *Objection to mode of statement, not available*.—A pleading is not bad on demurrer for insufficiency, if the defect objected to is not an omission of any necessary fact, but only a deficiency in the mode of stating some fact.

Bethel vs. Woodworth, 11 *Ohio St.*, 393, 396.

Harnish vs. Bramer, 71 *Cal.*, 155; s. c., 11 *Pacif. Rep.*, 888. (Rev'g for error in sustaining demurrer, where the essential facts were all alleged, although defectively or improperly.)

[See §§ 65, 66, as to *Indefiniteness and uncertainty*.]

§ 62. *Generality*.—The general rule that wherever a subject comprehends a multiplicity of matters, generality

of pleading is allowed,¹ is to be taken with the qualification that where there is anything specific in the subject, though consisting in a number of particulars, they must all be enumerated.²

¹ 1 *Chitt. on Pl.*, 16 *Am. ed.*, 346.

² *Van Ness vs. Hamilton*, 19 *Johns. (N. Y.)*, 349; *Cooper vs. Greeley*, 1 *Den. (N. Y.)*, 347. (Justification of defamation.)

People vs. Manhattan Co., 9 *Wend. (N. Y.)*, 351. (Grounds on which a forfeiture of a charter was sought.)

[Whether the remedy is now, in all cases, motion, *Query* ?]

§ 63. *General limited by specific allegations*.—If a general and specific allegations as to the same matter are combined, the general will be referred to and construed by the specific; and will be insufficient if the specific allegations are insufficient,¹ even though it be such that it would have been sufficient had it stood alone.

Story's Eq. Pl., 32 (citing *Ellis vs. Colman*, 25 *Beav.*, 662).
[See also §§ 33, 34, above, as to *General allegation being affected by details*.]

§ 64. *General averment of negative*.—Where a negative has to be alleged, a general averment is ordinarily sufficient.

Ohio, etc., Ry. Co. vs. Walker, 113 *Ind.*, 196; s. c., 15 *North East. Rep.*, 234. (Negligence: allegation that plaintiff was not guilty of negligence on his part, sufficient. The Court say: "It is evident that any other rule would be practically incapable of enforcement; for a negative fact can seldom be alleged, except generally and by way of denial, since any other course would require a process of exclusion and elimination that would lead to an almost endless pleading.")

§ 65. *Indefiniteness and uncertainty*.—Under the New Procedure, indefiniteness and uncertainty are not reached by a demurrer if the language fairly admits of a construction that will sustain the pleading.¹

Otherwise under the Equity Practice;² but a necessity for discovery disclosed by the bill excuses the defect.³

¹*Jossey vs. Stapleton*, 57 *Ga.*, 144. (The objection that the cause of action is not set forth with sufficient clearness or distinctness cannot be raised by a motion for nonsuit. If the objection is well founded, it may be a good cause for special demurrer or objection to evidence.)

Blake vs. Everett, 83 *Mass.* (1 *Allen*), 248.

Mills vs. Rice, 3 *Neb.*, 87. Insufficiency of pleading as to certainty, precision, and consistency of allegation which does not amount to such an absolute omission as to constitute no ground of action or defence, must be taken advantage of or objected to by motion under the provisions of the Code and can afford no ground for demurrer or assignment of error. [Citing 8 *Ohio St.*, 296.] Action for breach of covenants of warranty: judgment on demurrer reversed.)

Lorillard vs. Clyde, 86 *N. Y.*, 384, 389. (ANDREWS, J., says: "On demurrer, all reasonable intendments are indulged in support of the pleading demurred to. The complaint here is in some respects indefinite and uncertain, but the remedy for these defects is by motion, and not by demurrer.")

Berney vs. Drexel, 33 *Hun* (*N. Y.*), 34; reaff'd on reargument, *id.*, 419; and aff'g 63 *How. Pr.*, 471. (Holding that pleadings are not now to be strictly construed against the pleader; and averments which sufficiently point out the nature of the pleader's claim are sufficient, if under them, upon a trial of the issues, he would be entitled to give all the necessary evidence to establish the claim.)

Valley R. Co. vs. Lake Erie Iron Co. (*Ohio*, 1888), 1 *L. R. A.*, 410.

[Otherwise, under the California code, of a pleading "ambiguous, unintelligible, or uncertain." So, in some other states (see § 119), uncertainty is a separate ground of demurrer; but not available under a demurrer merely for insufficiency. *Palmer vs. Utah & N. R. Co.* (*Idaho*, 1887), 13 *Pac. Rep.*, 425.]

²*Ryves vs. Ryves*, 3 *Ves.*, 343. (Bill for discovery and delivery of title deeds, possession of estates and account. The bill stated generally that, under some deeds in the custody of defendants, plaintiff was entitled to some interest in some estates in their possession. Defendants demurred, objecting that the bill was one of those

vexatious fishing bills, and that it was so vague and uncertain that defendants could not plead to it, and must discover all deeds relating to the estates. The Master of the Rolls allowed the demurrer, and gave plaintiffs leave to amend.)

- * *Towle vs. Pierce*, 53 *Mass.* (12 *Met.*), 329. (Complainant filed his bill for a partnership accounting, alleging that defendant and others named had been his partners, and that they took a certain contract for work, and that complainant had never received all his share of the pay, but that defendant had received more than was due him sufficient to pay complainant, the others having received their full amount; that more than \$800 was due complainant, and he retained implements worth nearly \$1000; that all books and papers were in defendant's hands, or within his reach; and praying for discovery and a decree for payment. *Held*, that as all the books and accounts were in defendant's hands, defendant's demurrer, on the ground of uncertainty, in that neither times, sums, nor transactions were stated with definiteness or particularity, must be overruled.)

Wormald vs. De Lisle, 3 *Beav.*, 18. (Plaintiffs, assignees of a bankrupt, alleged that, previous to the bankruptcy, "certain dealings and transactions took place between the bankrupt and defendant," and that, by virtue of "certain agreements" for leases, the bankrupt was possessed of leasehold houses specified; that, in the course of such transactions, "certain loans" were made by defendant to the bankrupt, and the bankrupt, "as it was alleged by defendant," made "some lease" of the premises to defendant, and defendant had entered and received the rents; that plaintiffs could not discover with certainty the amount of the loans nor the terms of the lease, and prayed a discovery, etc. *Held*, a demurrer to the bill for uncertainty must be sustained.)

§ 66. — *the same,—sometimes fatal.*—A complaint is bad on demurrer which does not state the facts with sufficient definiteness and certainty to enable the Court to grant at least some part of the relief demanded, upon proof or admission of the facts contained in it.

[This was the rule in equity; and is the same under the New Procedure, for the obvious reason, that if the demurrer be overruled, and defendant does not answer, the Court can

give no other relief than is demanded, and if it could not give that, it ought not to overrule the demurrer.]

Tallman *vs.* Green, 3 *Sandf.* (N. Y.), 437. (Bill praying defendant might be decreed to satisfy a quit-rent and have it cancelled, but not describing it with any certainty, nor stating its amount, and how and when payable, nor whether the owner of the charge would consent to release it, *held* therefore bad on demurrer.)

But in equity a demurrer on the ground of uncertainty, irrelevancy, etc., must point out what parts are objected to and why.

Brady *vs.* Standard Loan Asso. (*Pa.*, 1884), 14 *W. N. C.*, 419.

Moyer *vs.* Livingood, 2 *Woodward* (*Pa.*), 317.

§ 67. *Omission of formal allegation required by rule of Court.*—The omission of a formal allegation required by rule of Court,—such as that required in partition, to the effect that the parties do not own other lands in common,¹—or that required in divorce, to the effect that the act was committed without connivance, etc.,²—or that formerly required in chancery as to the amount in controversy,³—is not ground of demurrer.

¹ Pritchard *vs.* Dratt, 32 *Hun* (N. Y.), 417.

² Van Benthuyssen *vs.* Van Benthuyssen, 17 *N. Y. State Rep.*, 978; s. c., 2 *N. Y. Supp.*, 238; 15 *Civ. Pro. R.*, 234.

³ Batterson *vs.* Ferguson, 1 *Barb.* (N. Y.), 490; and see *Mitf. Pl.*, c. 2, § 2; 1 *Dan. Ch. Pr.*, 412, 625.

[But compare cases under *Defining the issue.*]

§ 68. *Mixed question of law and fact.*—An allegation of a matter which is a mixed question of law and fact, so that it is not a question for the jury exclusively, is insufficient on demurrer.

Clay Fire & Mar. Ins. Co. *vs.* Wusterhausen, 75 *Ill.*, 285. (Allegation that a change took place in the title to the property insured, by voluntary transfer and without consent of the defendant, and thereby the policy became void.)

[Such allegations are however sanctioned in other jurisdictions. The above rule seems too broad. A mixed question of law and fact is a question of fact which requires instruction, as to its limits, by the Court. It is not a conclusion of law within the rule that an allegation of a conclusion of law is bad on demurrer.]

[*Compare* Teese vs. Phelps, *Mc All.*, 17, holding that whether a given improvement is patentable, it being objected that it is neither an art, manufacture, nor composition, is a mixed question of law and fact, not to be decided on demurrer.]

VII. DEMURRER FOR INSUFFICIENCY.

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| <p>1. FORM OF ASSIGNING GROUND, §§ 69-71.</p> <p>2. OBJECTIONS RELATING TO PARTIES, §§ 72-81.</p> <p>3. OBJECTIONS INVOLVING THE FORM OF THE PLEADING DEMURRED TO, §§ 82-88.</p> | <p>4. OBJECTIONS TOUCHING THE NATURE OR SUBSTANCE OF THE CAUSE OF ACTION OR RELIEF, §§ 89-123.</p> <p>5. OBJECTION THAT THE ACTION IS PREMATURE, OR THAT A DEFENCE IS DISCLOSED, §§ 124-128.</p> <p>6. PARTICULAR SUBJECTS OF ALLEGATION (alphabetically arranged), §§ 129-365.</p> |
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1. FORM OF ASSIGNING GROUND.

[As to how far the statutory language is necessary under the Code see § 2, etc.]

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| <p>§ 69. Right to raise any objection to cause of action,</p> | <p>§ 70. Equivalent to want of equity.
71. Specification of defect.</p> |
|---------------------------------------------------------------|-----------------------------------------------------------------------------|

§ 69. *Right to raise any objection to cause of action.*—Under a demurrer assigning this ground in the words of the statute without specifications, counsel may on the argument raise any objection which shows that a complete cause of action is not shown, or that a complete defence is shown.

Nellis *vs.* De Forest, 16 *Barb.* (N. Y.), 61.

Compare, as to Michigan, where a demurrer must specify every defect relied on,—Adrian Water Works *vs.* City of Adrian, 64 *Mich.*, 584; s. c., 7 *West. Rep.*, 838; s. c., 31 *North West.*, 529.

§ 70. *Equivalent to want of equity.*—In the United States Court, in equity, a demurrer assigning as ground that the bill does not state facts sufficient to constitute a cause of action (as if the action were under the Code) avails as the equivalent of a demurrer for want of equity.

Nicholas *vs.* Murray, 5 *Sawy.*, 320. (Holding that it can only so avail.)

[For other cases on *Form of assigning this ground* see § 2, etc.]

§ 71. *Specifications of defect.*—If a demurrer assigning as its ground that the complaint does not state facts sufficient to constitute a cause of action, qualifies that assignment by specifying the defect relied on, the demurrant has not the right on the argument to raise any other objection:

Nellis *vs.* De Forest, 16 *Barb.* (N. Y.), 61.

2. OBJECTIONS RELATING TO PARTIES.

§ 72. Want of capacity to sue.

73. Not the proper plaintiff.

74. — State practice in United States Court.

75. Defect of parties plaintiff.

76. Improper joinder, — of *plaintiffs*.

§ 77. — application of the rule to husband and wife.

78. — form of assigning ground.

79. — of *defendants*; insufficiency against one demurring.

80. — — Insufficiency as against co-defendant not demurring.

81. Defect of parties defendant.

§ 72. *Want of capacity to sue.*—A demurrer on the mere ground of insufficiency does not enable the demurrant to raise the objection that plaintiff has not legal capacity to sue.

Litchfield vs. McComber, 42 *Barb. (N. Y.)*, 288. (Action by a tax collector. Demurrer only for insufficiency admits plaintiff's legal capacity to sue.)

Viburt vs. Frost, 3 *Abb. Pr. (N. Y.)*, 119; s. c., as *Hobart vs. Frost*, 5 *Duer (N. Y.)*, 672. (Action by receiver: objection that the appointment of plaintiff appears by the complaint to be invalid, not thus available.)

Phoenix Bank vs. Donnell, 40 *N. Y.*, 410. (The want of capacity to sue., e.g. a plaintiff not duly incorporated, cannot be considered.) s. p., *Fulton Fire Insurance Co. vs. Baldwin*, 37 *N. Y.*, 648; *Bank of Lowville vs. Edwards*, 11 *How. Pr.*, 216; *Irving National Bank vs. Corbett*, 10 *Abb. N. C. (N. Y.)*, 85.

American Baptist Home Mission Soc. vs. Foote, 52 *Hun (N. Y.)*, 307. (In an action by several plaintiffs, it was doubted whether a demurrer in this form as to all the plaintiffs would lie, where it was objected that the incorporation of one of them was not sufficiently alleged.)

Van Zandt vs. Van Zandt, 26 *N. Y. State Rep.*, 963. (Interpleader.)

Hafner & Schoen Furniture Co. vs. Grumme, 10 *Civ. Pro. R. (N. Y.)*, 176. (The omission to state whether the plaintiff is a domestic or foreign corporation, as required by § 1775 of the Code, does not go to the cause of action, and does not render the complaint demurrable for not stating sufficient facts.)

Contra, *First Nat. Bank of Northampton vs. Doying*, 11 *Civ. Pro. R.*, 61.

[For other cases see *Demurrer for incapacity*, below.]

§ 73. *Not the proper plaintiff*.—A complaint which shows on its face that the right of recovery on the cause of action alleged is not in the plaintiff but in a third person, is demurrable on the ground that it does not state facts sufficient to constitute a cause of action.

Sinker vs. Floyd, 104 *Ind.*, 291; s. c., 2 *West. Rep.*, 218.

DeWitt vs. Chandler, 11 *Abb. Pr. (N. Y.)*, 459. (A president of an association brought an action in behalf of the society to recover a legacy that had been left to its treasurer. *Held*, as the right of action was in the treasurer, the complaint should be dismissed for not stating a cause of action.)

Mosselman vs. Caen, 1 *Hun (N. Y.)*, 647. (If a foreign assignee in bankruptcy has no right to sue here, a com-

plaint setting up his title as such is insufficient and will be dismissed on motion. The Court say "A complaint must always show title in the plaintiffs of the subject-matter of the action, or such an interest therein as indicates them to be proper parties to the litigation; otherwise it fails to state facts sufficient to constitute cause of action in favor of plaintiffs against defendants.")

Rutland Probate Ct. *vs.* Hull, 58 *Vt.*, 306; s. c., 5 *East. Rep.* 60. (Objection available on general demurrer at common law.)

Carter *vs.* Carter, 82 *Va.*, 624. (A bill in equity is demurrable if it fails to show in complainant an interest in the subject-matter and a proper title to institute a suit concerning it.)

s. p., Barr *vs.* Clayton, 29 *W. Va.*, 256.

§ 74. — *State practice in U. S. Court.*—State practice allowing actions to be brought in the name of the real party in interest,¹ or in the name of the trustee of an express trust,² is applicable in civil causes (other than in equity and admiralty) in United States Circuit and District Courts sitting in the same State.

¹ Weed Sewing Mach. Co. *vs.* Wicks, 3 *Dill.*, 261.

Arkansas Smelting Co. *vs.* Belden, 127 *U. S.*, 379, 387.

May *vs.* County of Logan, 30 *Fed. Rep.*, 250.

² Albany & Renss. R. Co. *vs.* Lundberg, 121 *U. S.*, 451.

[As to the limits of State practice in U. S. Courts, see §§ 26-30.]

§ 75. *Defect of parties plaintiff.*—In equity,¹ and in the United States Courts,² and under the New Procedure,³ the omission to join with a proper plaintiff a necessary co-plaintiff is not available under a general demurrer for insufficiency.

¹ Dias *vs.* Bouchaud, 10 *Paige Ch. (N. Y.)*, 455.

² *U. S. R. S.*, § 954.

³ *N. Y. Code Civ. Pro.*, § 488, subd. 6.

Loomis *vs.* Tift, 16 *Barb. (N. Y.)*, 541.

[But the Court may at the trial entertain the objection of the absence of an indispensable party, though not pleaded.]

§ 76. *Improper joinder,—of plaintiffs.*—In equity, the misjoinder of one as a party plaintiff could be reached by a general demurrer to the whole bill for want of equity.¹

Under those codes which do not make misjoinder of parties plaintiff a special ground of demurrer,² if no cause of action is stated in favor of one of the plaintiffs the defendant can only demur as to such plaintiff on the ground that the complaint does not state facts sufficient to constitute a cause of action.³

¹ *Hodge vs. North Missouri R. Co.*, 1 *Dill.*, 104. (Bill to restrain patent infringement, in which an heir of the deceased patentee and owner joined with the administrator. *Held.* proper to sustain a demurrer for want of equity, for the joinder of the heir was improper, he having no interest.)

[Citing *Story Eq. Pl.*, § 509; 4 *Russ.*, 225; *Id.*, 242; *Id.*, 244; 3 *Paige*, 336.]

Christian vs. Crocker, 25 *Ark.*, 327. (Bill in equity. If there is a misjoinder of parties plaintiffs, then all the defendants may demur; but if there is a misjoinder of parties defendant, those only can demur who are improperly joined.)

² Which was the case with the N. Y. Code of Procedure in force up to 1876.

³ *Richtmyer vs. Richtmyer*, 50 *Barb. (N. Y.)*, 55. (Action to enforce a trust. *Held.* that if there is a misjoinder of parties, that is, if the facts stated show no cause of action against the defendants in favor of one of the plaintiffs, the defendants may demur as to such plaintiff upon the ground that the complaint does not state sufficient facts. In such a case the defendant must specify the plaintiff to whom he objects as a party.)

s. P., *Simar vs. Canaday*, 53 *N. Y.*, 298; *Rumsey vs. Lake*, 55 *How. Pr.*, 340.

Peabody vs. Washington County Mut. Ins. Co., 20 *Barb. (N. Y.)*, 339. (Action on policy, by the insured and his assignee. A demurrer to the whole complaint, first for defect of parties, and second because it did not state sufficient facts, should be overruled, if the complaint shows a cause of action in favor of one of the plaintiffs, as under the Code judgment may be given for or against one or more of several plaintiffs.)

Masters *vs.* Freeman, 17 *Ohio St.*, 323.

Berkshire *vs.* Shultz, 25 *Ind.*, 523. (Action to redeem from a foreclosure. Where two or more plaintiffs unite in bringing a joint action and the facts stated do not show a joint cause of action in them, a demurrer will lie upon the ground that the complaint does not state sufficient facts. The Court say: "It is proper we should add that the demurrer in such a case will be sufficient if stated in the language of the statute, and need not be directed against the particular plaintiff in whose favor no cause of action is shown.")

s. p., Rush *vs.* Thompson, 112 *Ind.*, 158; s. c., 11 *West. Rep.*, 236, 13 *North East. Rep.*, 665, and cases cited.

[One reason is that a joint cause of action which precludes an individual set-off or counterclaim is a different cause of action from an individual claim.]

Contra,—Case *vs.* Carroll, 35 *N. Y.*, 385. (Defect of joining too many as plaintiffs not reached by demurrer.)

Contra, to the statement that demurrer need not specify improper joinder, see authorities under note 3.

§ 77.— *application of the rule to husband and wife.*—

It is the better opinion that under the New Procedure,—which allows married women to sue and be sued as if sole, and judgment to be given for or against one or more of several plaintiffs,—this rule applies to husband and wife suing on a cause of action belonging exclusively to either,¹ except where the husband, though not a necessary party, is still regarded as a proper party to an action in which his wife is plaintiff.²

¹ Simar *vs.* Canaday, 53 *N. Y.*, 298. (Action by husband and wife for damages for defendant's fraud in inducing plaintiffs to convey to him. *Held*, misjoinder of plaintiffs was not a ground of dismissal against both, if either had a cause of action. In such a case the motion must be specific for the dismissal of the complaint as to the plaintiff in whom no right of action appears.)

s. p., Palmer *vs.* Davis, 28 *N. Y.*, 242.

[*Contra* Mann *vs.* Marsh, 35 *Barb. (N. Y.)*, 68; s. c., less fully, 21 *How. Pr.*, 372. (When two or more plaintiffs unite in bringing a joint action, and the facts stated do not show a joint cause of action in them, a demurrer will lie upon the ground that the complaint does not state facts sufficient to constitute a cause of action. So

held where a husband and wife brought an action for assault on the wife, and it appeared from the complaint that the wife alone should have brought it.) Followed in *Walrath vs. Handy*, 24 *How. Pr. (N. Y.)*, 353, (Action to obtain the construction of a will where the wife was improperly joined.)

Farnham vs. Campbell, 34 *N. Y.*, 480. (*It seems that if husband and wife join in an action concerning the separate property of the wife, demurrer to complaint lies on the ground that it does not state cause of action in the plaintiffs, the husband and wife being regarded in law as one person, and therefore not within the rule allowing the name of the husband to be dropped out of the complaint.*)

[*Rumsey vs. Lake*, 55 *How. Pr. (N. Y.)*, 339. (Complaint, by husband and wife, showed a cause of action in the wife only. Defendant's demurrer (assigning both the ground that it did not state a cause of action in favor of plaintiffs and that it did not state cause of action in favor of the husband) was sustained with leave to the wife to amend by striking out the name of the husband.)

[Here the demurrer was sustained as to both, amendments being required by the wife in order to get rid of the husband.]

[*Bartges vs. O'Neils*, 13 *Ohio St.*, 72. (Action by husband and wife for defendant's deceit in inducing the husband to purchase lands which were conveyed to the wife. *Held*, the defect that no cause of action was shown in the plaintiffs jointly might be taken advantage of by a demurrer upon the ground that the petition did not state sufficient facts.)

[*Mich. Cent. R. Co. vs. Coleman*, 28 *Mich.*, 440.]

² *Ohio & Miss. R. Co. vs. Cosby*, 107 *Ind.*, 32 ; s. c., 4 *West. Rep.*, 464.

§ 78. — *form of assigning ground.*—Where the statute¹ makes misjoinder of parties plaintiff a special ground for demurrer, the objection cannot be raised on demurrer assigning only the ground that facts sufficient to constitute a cause of action are not stated.²

¹ As in case of the present provision of the *N. Y. Code Civ. Pro.*, § 488.

² *Tennant vs. Pfister*, 51 *Cal.*, 511. (In California, misjoinder of parties plaintiff is a special ground of demurrer, and the objection cannot be raised under a

general demurrer that the complaint does not state sufficient facts.)

Berney vs. Drexel, 33 *Hun* (N. Y.), 419; s. c., 19 *Weekly Dig.*, 419; reaff'g 33 *Hun*, 34. (It appeared from the complaint in conversion that a widow had improperly united with devisees in bringing the action. *Held*, the objection that the complaint showed affirmatively that no cause of action vested in all the parties plaintiff, could not be raised by demurrer on such ground; as misjoinder of parties plaintiff was a special ground of demurrer under the Code.)

(The demurrer in this case was general against all the plaintiffs; the dicta state that it should have been for misjoinder of plaintiffs, and the specific defect relied on pointed out.)

[*Contra*, *Hynes vs. Farmers' Loan & T. Co.*, 31 *N. Y. State Rep.*, 136. The decision of this case is in conflict with the preceding, but the point that the demurrer should have been special is not considered in the opinion.]

[Whether it could be raised if the demurrer is qualified as objecting that the complaint states no cause of action in favor of the particular plaintiff, *Query*? The better opinion is that such a statement is sufficient; because in effect full notice of the real objection, and in substance exactly equivalent to specifying a misjoinder of that plaintiff.]

§ 79. *Defendants; insufficiency, as against one demurring.*—A demurrer for insufficiency by one or more of several defendants improperly joined must be sustained irrespective of the existence of a cause of action against other defendants.

Voorhis vs. Baxter, 18 *Barb.* (N. Y.), 592. (In an action on a firm note against the surviving partners and the representatives of a deceased partner, demurrer for insufficiency by the latter sustained where no circumstances were alleged to raise an equity against them.)

s. p., *Voorhis vs. Childs*, 17 *N. Y.*, 354. (In this case the Court say: "The present action must be regarded as one of a purely legal nature, brought against the survivors on their legal liability. It follows that the executors of the deceased partner who is liable only in equity were improperly made parties.")

Edson vs. Girvan, 29 *Hun* (N. Y.), 422.

Berford *vs.* N. Y. Iron Mine, 56 *Super. Ct.*, 236 ; s. c., 4 *N. Y. Supp.*, 836 ; 21 *State Rep.*, 439.

Belknap *vs.* Caldwell, 83 *Ind.*, 14. (In a suit for relief from fraud against several defendants, where as to one of them the complaint fails to show any knowledge of or connection with it, he is not a proper party ; and a demurrer by him should be sustained.)

§ 80. — *insufficiency as against co-defendant not demurring.*—A demurrer for insufficiency by one or more of several defendants properly joined, cannot be sustained on the ground that the complaint is not sufficient as against another defendant.

N. Y. & New Haven R. R. Co. *vs.* Schuyler, 7 *Abb. Pr.*, 41 ; s. c., 17 *N. Y.*, 592. (The mere joinder of too many persons as defendants when there is no misjoinder of subjects is not a ground of demurrer by any one of them against whom the complaint sets forth a good cause of action.)

Wood *vs.* Decaster, 66 *Me.*, 542.

Slevin *vs.* Reynolds, 1 *Handy (Ohio)*, 37.

Lewis *vs.* Williams, 3 *Minn.*, 151. (Action of indebtedness upon contract.)

Miller *vs.* Jamison, 9 *C. E. Green (N. J.)*, 41. (To a bill to set aside a conveyance as fraudulent the defendant grantee demurred on the ground, *inter alia*, of multifariousness, in that a mortgagee of such grantee, and certain other persons, were made parties defendant. The chancellor, after holding them to be proper parties, remarked that defendant grantee could not raise the objection, even had it been valid. The objection could only be taken by the parties themselves.)

Jones *vs.* Foster, 67 *Wis.*, 296 ; s. c., 30 *North West. Rep.*, 697.

But the same objection *may* sustain a demurrer for misjoinder ; see Nichols *vs.* Drew, 94 *N. Y.*, 22 ; Edson *vs.* Girvan, 29 *Hun*, 422.

§ 81. *Defect of parties defendant.*—In equity,¹ and in the United States Courts,² and under the New Procedure,³ an objection for defect of parties defendant cannot be raised under a general demurrer.

At common law the omission to join as defendant a joint obligor (except in the case of judgments, recognizances, etc.) was available under a general demurrer.⁴

¹ *Robinson vs. Smith*, 3 *Paige's Ch. (N. Y.)*, 222, 230.

² *U. S. R. S.*, § 954.

³ *N. Y. Code Civ. Pro.*, § 488, subd. 6.

⁴ *Gilman vs. Rives*, 10 *Pet. (U. S.)*, 298.

But the Court may entertain the objection of the absence of an indispensable party.

3. OBJECTIONS INVOLVING THE FORM OF THE PLEADING DEMURRED TO.

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| § 82. Fact common to several causes of action or defences. | § 86. Separate counts for same recovery. |
| 83. Demurrer, without discrimination, to commingled statement. | 87. Separate counts presumed to refer to separate transactions. |
| 84. — with discrimination. | 88. Verification lacking. |
| 85. Improper division of a single cause of action or defence. | |

§ 82. *Fact common to several causes of action or defences.*—Where several causes of action or defences are separately stated in the same pleading, an omission of an essential allegation in one cannot be supplied against demurrer by reading the missing link from another count or defence.¹

But it is the better opinion that if a fact common to several causes of action or defences is separately alleged, as if introductory to all,² or if it is alleged in one and expressly adopted by reference in another,³ it is sufficiently alleged in each.

¹ See cases under §§ 21, 22.

² *Ronnie vs. Ryder*, 28 *N. Y. State Rep.*, 141. (Action against husband and wife for slander by wife. One numbered paragraph alleged that the defendants at

the time of the grievances hereinafter mentioned were husband and wife. Each of three followed numbered paragraphs stated a slander as a separate cause of action. *Held*, sufficient, or if not, yet amendable ; and not error to refuse to dismiss the complaint at the trial.)

- * *Goodman vs. Gay*, 15 *Pa. St.*, 188 ; s. c., 53 *Am. Dec.*, 589. (Subsequent counts intelligibly referring to *time* correctly averred in a previous count, *held* sufficiently to show the time.)

Freeland vs. McCullough, 1 *Den. (N. Y.)*, 414 ; s. c., 43 *Am. Dec.*, 685. (Statement, in a later count, of "the same respective amounts and for the same respective considerations in the last preceding count of this declaration set forth," *held*, proper and sufficient.)

- 1 *Chit. Pl.*, 16 *Am. ed.*, 373. (Demurrer in such case frivolous.)

[The reasons for the existence of the main rule are that the time of the Court ought not to be spent in searching other parts of the pleading ; and that if one count or defence be struck out, there is nothing to point to. The objection is almost wholly obviated by an introductory allegation, or by express reference, and whatever inconvenience remains is not good ground of demurrer, but is matter for prompt motion.]

§ 83. *Demurrer without discrimination, to commingled statement.*—A demurrer to a cause of action or defence as a whole, for not stating facts sufficient, etc., cannot be sustained if the statement demurred to contains facts sufficient, although there be commingled therewith matter separable in its nature, and intended, but not sufficing, to constitute, a separate cause of action or defence.

Hendrickson vs. Pennsylvania R. R. Co., 14 *Vroom (N. J.)*, 464, abstr. ; s. c., 25 *Alb. L. J.*, 416.

Wright vs. Smith, 81 *Va.*, 777, 779.

Robrecht vs. Marling, 29 *W. Va.*, 765, 769 ; s. c., 2 *South East.*, 827. (With dictum that the demurrer should point to such parts as are bad.)

In *Hackley vs. Draper*, 4 *S'ym. Ct. (T. & C.)*, 614 (aff'd in 60 *N. Y.*, 88, without noticing this point), it was *held* that new matter introduced into a complaint by amendment cannot be demurred to alone, but the demurrer must be to the whole complaint, or some one of the causes of action thereon.

§ 84. — *with discrimination*.—The commingling in one statement of several causes of actions or defences cannot prevent demurring to either with the same effect as if separately stated. The pleader cannot defeat the demurrer by reliance on the defect in his own pleading.

Burhans *vs.* Squires, 75 *Iowa*, 59, 39 *N. W.*, 181.
s. p., Wiles *vs.* Suydam, 64 *N. Y.*, 173.

§ 85. *Improper division of single cause of action or defence*.—The mistake of a pleader in stating as separate causes of action or defences, facts which are only sufficient when combined as a single cause of action, or a single defence, does not render the pleading demurrable but the separation may be disregarded.

Hillman *vs.* Hillman, 14 *How Pr. (N. Y.)*, 456.

Weeks *vs.* Cornwall, 39 *Hun (N. Y.)*, 643, 644; s. c., 9 *Civ. Pro.*, 28, 23 *Weekly Dig.*, 515.

s. p., Shook *vs.* Fulton, 4 *Cow.*, 424. (Holding that after verdict in favor of defendant on a defence made out thus by combining two pleas each insufficient alone, the objection is cured even at common law.)

Norman *vs.* Rogers, 29 *Ark.*, 365. (Error to sustain demurrer in such case.)

Everett *vs.* Waymire, 30 *Ohio St.*, 308.

Contra, Bliss *on Pl.*, 121, citing other cases.

In Victory Webb Mfg. Co. *vs.* Beecher, 26 *Hun (N. Y.)*, 49, it was held that after a demurrer to separate counts of a complaint had been overruled, plaintiff could not on appeal claim that the decision was wrong because the several counts all taken together contained matter constituting a cause of action. DAVIS, P.J., said: "It seems impossible to treat the complaint as containing a single cause of action. By its express allegations it contains several; and if it be true that the separation of them was not in all cases necessary, yet as to some portions it certainly was, and the plaintiff ought not to be heard now to urge his own inaccuracy in making the separations as a ground for defeating a demurrer which adopts and follows his own division and classifications."

Compare Andrews *vs.* Alcorn, 13 *Kan.*, 351. (Holding that although a demurrer might or should have been sustained where the pleader wrongly inserted the words,

"1st cause of action," "2d cause of action," when there was in fact but one cause of action, yet if no substantial injustice has been done the parties by overruling the demurrer, judgment will not be reversed on appeal.)

§ 86. *Separate counts for same recovery.*—A complaint is not demurrable for stating, in separate counts or causes of action, separate grounds for substantially the same recovery, not containing any absolutely inconsistent allegations, if the causes of action are such as might be joined were they not for the same recovery.

Ware vs. Reese, 59 *Ga.*, 588. (*Assumpsit* for the alleged breach of a contract for the sale of land for a fixed price. Plaintiff afterwards added a count on a *quantum meruit*. Held, on demurrer, that a count on *quantum meruit* may be joined with one in contract for the same services, etc.; so that in the event of failure to prove the contract, recovery may be had upon the *quantum meruit*.)

[For other authorities, see § APPLICATIONS AT THE TRIAL, *Election*.]

[Most of the treatises on pleading contain a statement that this is not allowable under the Codes of Procedure; but the contrary is now generally held. See note in 24 *Abb. N. C.* The practice of compelling plaintiff to elect at the trial even where there is no inconsistency or embarrassment to the defendant, still continues much as at common law; but it might be restricted within narrow limits if the following propositions are sound, as I believe them to be: I. If there is no absolute inconsistency of fact, such that perjury would be assignable if the pleading be sworn, the objection, if any there be, must rest on the ground either of "unnecessary repetition," "indefiniteness and uncertainty," or "misjoinder." II. All right to object for misjoinder is waived by not demurring on that ground. III. Neither unnecessary repetition, nor any indefiniteness and uncertainty which repetition alone can cause, are ground for demurrer or dismissal. IV. In all or nearly all cases, the meritorious ground of objection, if any, is the embarrassment to the defendant in being required to meet unnecessary or incongruous issues; and his proper remedy to avoid that is by special motion before trial to strike out or make more definite and certain; and if, instead of doing so, he takes issue on each

cause of action and goes to trial, he invites plaintiff to try the issue. After having done this, the only advantage that he can insist on as matter of right is, first, to use the allegations in one cause of action as evidence against those in the other, if there be any incongruity; and second, to ask the Court to direct the jury to find on each cause separately, if they are essentially different in such sense as to require concurrence of the jury on any one separately in order to sustain a general verdict. But, although the defendant may have no right to compel election, the Court has certainly a discretion to refuse to try issues which embarrass each other, or to give such direction as to the order of trial as will practically sever them.]

§ 87. *Separate counts presumed to refer to separate transactions.*—If it is possible, and consistent with the allegations of the complaint, that there may have been two separate transactions, to which the otherwise inconsistent allegations of separate causes of action may have been intended to refer, the Court will not, on demurrer, presume the contrary.

Castro vs. Uriarte, 12 *Fed. Rep.*, 250, 259. (So holding on demurrer to a complaint setting up a cause of action for false imprisonment, and for malicious prosecution by arrest on the same day.)

§ 88. *Verification lacking.*—In chancery, the omission to verify a bill, which by the rules or practice of the court requires verification,—such as a bill on a lost instrument,—is ground of demurrer.¹

Under the New Procedure objection to lack of verification must be taken by returning or disregarding the pleading.²

¹ *Findlay vs. Hinde*, 1 *Pet.*, 241, 244. (Holding that if not so taken, or otherwise at or before the hearing, it may be deemed waived.)

² *Abb. New Pr. & F.*, 439. Otherwise under some statutes requiring sworn denials.

4. OBJECTIONS TOUCHING THE NATURE OR SUBSTANCE OF THE CAUSE OF ACTION OR RELIEF.

A. Nature of Claim.

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| § 89. Theory of case need not be stated. | § 96. Allegations involving mistake as to the law. |
| 90. General rule for sustaining complaint against demurrer. | 97. Immaterial allegations not regarded. |
| 91. Informal pleading. | 98. Various grounds for same recovery. |
| 92. Statutory change of burden of proof. | 99. Alternative grounds. |
| 93. Penal actions. | 100. Alternative version and relief. |
| 94. Actions without precedent. | 101. — by trustee of a special trust. |
| 95. Allegations stating insufficient grounds with other and sufficient grounds. | |

B. Legal or Equitable Cause.

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| § 102. Jurisdiction. | § 104. Action for money or chattel. |
| 103. Equitable title. | |

C. Accounting.

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| § 105. Mutual accounts. | § 108. Royalty contracts. |
| 106. Existence of fiduciary relation, or necessity for discovery. | 109. Facts showing ground of equitable cognizance to be specially alleged. |
| 107. — Remedy at law. | |

D. No Adequate Remedy at Law.

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|----------------------------------------------|--------------------------------------------------------------|
| § 110. Form of demurrer. | § 114. What is a "remedy at law." |
| 111. Showing want of adequate remedy. | 115. What is a "plain, adequate, and complete" remedy. |
| 112. — in case of several grounds of relief. | 116. "Jurisdiction clause" directly alleging want of remedy. |
| 113. Assignee. | 117. Estoppel against this objection. |

E. Contract or Tort.

- § 118. When uncertainty is ground of demurrer.

F. *Demurrer to Relief.*

§ 119. General rule.

120. Relief against demurrant.

§ 121. — Against co-defendant.

122. Alternative relief.

A. *Nature of Claim.*

§ 89. *Theory of case need not be stated.*—A pleader is not bound to state the theory of law on which his claim is based. Facts alone must be stated, and if stated in such a manner as to enable the Court to see that they constitute a cause of action or defence, the pleading is not demurrable because it does not state the legal effect of facts.

Darrah vs. Boyce, 62 *Mich.*, 480, 29 *North West. Rep.*, 102. (Holding that if the demurrer is general, it will be overruled if the bill can be sustained upon any theory of the case.)

Hemmingway vs. Poucher, 98 *N. Y.*, 281. (Answer stating facts sufficient on one theory not bad though stated in form to suggest an untenable theory.) [Citing *Oneida Bank vs. Ontario Bank*, 21 *N. Y.*, 490.]
s. p., *Chatfield vs. Simonson*, 92 *N. Y.*, 209, 218.

§ 90. *General rule for sustaining complaint against demurrer.*—A demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action is not sustainable except when, admitting all the facts (as distinguished from conclusions of law) which are alleged (even though argumentatively or indefinitely alleged), no cause of action whatever is presented for any part of the relief demanded; or when, with facts showing a cause of action, a complete defence thereto is also sufficiently stated.

See cases under sections 91–97 and 119–121, below.

§ 91. *Informal pleading.*—Under the New Procedure, a demurrer to a complaint for insufficiency can only be

sustained when it appears that, admitting all the facts alleged, it presents no cause of action whatever. It is not sufficient to sustain a demurrer that the facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that the material facts are only argumentatively averred. The complaint on demurrer is deemed to allege what can be implied from the allegations therein, by reasonable and fair intendment, and facts impliedly averred are traversable in the same manner as though directly averred.

Marie vs. Garrison, 83 *N. Y.*, 14, 23. (ANDREWS, J., citing 1 *Chitty's Pl.*, 713; *Haight vs. Holley*, 3 *Wend.*, 258; *Prindle vs. Caruthers*, 15 *N. Y.*, 425.)

Wetmore vs. Porter, 92 *N. Y.*, 76, 80 (rev'g decision below on demurrer for error in this respect).

People vs. Mayor, etc., of *N. Y.*, 8 *Abb. Pr.*, 7; 28 *Barb.*, 240. (A complaint is not demurrable for insufficiency if it actually contains elements of a cause of action however inartificially they may be stated. It is the duty of the Court to analyze the facts disclosed, and if the whole or any part of them can be resolved into a cause of action, the demurrer should be overruled.)

s. p., *Simpson vs. Prather*, 5 *Oreg.*, 86.

Morse vs. Gilman, 16 *Wisc.*, 504.

In *Meyer vs. Staten Island Ry. Co.*, 7 *N. Y. State Rep.*, 245, the Court say: "In considering the propriety of the demurrer herein, the duty is imposed of marshalling all the facts to be gathered, whether definitely or indefinitely, or argumentatively stated or impliedly averred, or apparent from reasonable and fair intendment. The rule springs from a broad spirit of justice, which must not permit a meritorious cause to be affected by reason of the pleader's obscure or infelicitous methods, or inability to spread out the facts clearly. Obscurity of statement is no longer permitted to defeat a remedy, if one exist, however it may enlarge the labors of the tribunal."

§ 92. *Statutory change of burden of proof.*—A remedial or curative statute shifting the burden of proof from the plaintiff to defendant—in this case as to tax titles—does not relieve the plaintiff from the necessity of alleg-

ing so much in his complaint or petition as is necessary to show that the right is in him.

Maguiar vs. Henry, 84 *Ky.*, 1 ; s. c., 4 *Am. St. Rep.*, 182.

§ 93. *Penal actions*.—A demurrer in a *qui tam* action for a statute penalty for an offense not made criminal, is to be determined on the principles applicable to civil, not criminal, actions.

Fish vs. Manning, 31 *Fed. Rep.*, 340 (patent law : citing *U. S. vs. Boyd*, 116 *U. S.*, 634, as holding otherwise of a criminal offence.)

[As to what is a civil case as distinguished from a criminal one, see note in 23 *Abb. N. C.*, 115.]

§ 94. *Actions without precedent*.—A complaint is not to be held demurrable merely because the action appears to be without precedent.

See cases collected in note in 23 *Abb. N. C.*, 447 ; for other illustrations *Piper vs. Hoard*, 107 *N. Y.*, 73, *PECKHAM, J.*, saying : " If to assume jurisdiction and grant relief in such a case would be to run counter to well-settled rules of equity, that fact would be a sufficient answer to the plaintiff's prayer for judgment herein. But if the most that can be said is that the case is novel and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of this judgment."

Muldowner vs. Morris & Es. R. Co., 42 *Hun*, 444, 447, *PRATT, J.*, saying : " Whatever may be the technical relation of the parties, the plaintiff has made out a case entitling him to relief. It is not fatal to his claim that no precise authority can be found in this State authorizing such a judgment. It was, under the common law, the practice in England, when a suitor desired redress for a wrong for which there was no established remedy, to apply to the proper court to frame a writ that would give him a just remedy, and that form of action known as ' action upon the case ' was adopted to meet a large number of such cases. Again, courts of equity were established to afford a remedy where the technical rules of law were insufficient to administer justice. The Supreme Court of this State, under the Constitution,

has 'general jurisdiction in law and equity,' and exercises, under such rules of practice as the legislature has established, the common-law and chancery powers exercised in this State prior to the adoption of the Constitution of 1846. The plaintiff is properly before the Court, its jurisdiction is not questioned, and no technical rule of practice forbids its doing justice between the parties."

[The full jurisdiction of equity is expressly preserved to the Supreme Court of New York by Code Civ. Pro., § 219.]

§ 95. *Allegations stating insufficient grounds with other and sufficient grounds.*—Where the language of a complaint suggests doubt as to which of two causes of action was intended by the pleader, and allegations can be gathered from it which are sufficient to sustain one of them, but not allegations sufficient to sustain the other, the complaint will be regarded as intending the former, and allegations appropriate only to the latter may be disregarded as surplusage.

Quintard *vs.* Newton, 5 *Robt.* (N. Y.), 72.

s. P., Krower *vs.* Reynolds, 99 N. Y. 245

Boyle *vs.* City of Brooklyn, 71 N. Y., 1; rev'g 8 *Hun*, 32.

(Complaint to set aside assessment as cloud on title, for a defect which did not appear on the record, but containing an allegation also of a defect which did appear on the record. Demurrer for insufficiency urged on the ground that if the latter allegation were true, plaintiff had no need of relief in equity, for the assessment was void at law. *Held*, error to sustain the demurrer. RAPALLO, J., says: "But is she bound to repose wholly upon the second alleged ground of invalidity? When the contest comes and the lien is sought to be enforced, the claimant under the lien will be at liberty to contest her objection and she may fail in maintaining it. In the mean time, her evidence to establish the first ground of defence may have been lost. It is to protect parties against this danger that actions to remove clouds upon titles are allowed. I do not think that a plaintiff in such an action, properly framed, should be deprived of the remedy simply for the reason that the complaint also set out an additional objection to the validity of the lien sought to be annulled, which, if well founded,

would appear in the proceedings to enforce the lien. It may not prove well founded in fact, and the party should not be compelled to repose wholly upon it. The allegation may be treated as surplusage.")

[*Compare Requa vs. Guggenheim*, 3 *Lans.* (N. Y.), 51, holding that if plaintiff so frames his complaint as to leave it uncertain on which of two causes of action he relies, and he can have but one recovery, the complaint should be construed in the way most favorable to defendant.]

§ 96. *Allegations involving mistake as to the law.*—

If a good cause of action appears, allegations added apparently for the purpose of making out a case under a mistaken theory of law as to the plaintiff's rights may be disregarded as surplusage.¹ A defendant who denies such allegations is not thereby estopped from insisting on the application of the proper legal rule.²

Nor is the plaintiff who made them estopped,³ unless they have so affected the frame and theory of the action as to mislead the defendant or result in a failure to prove the alleged cause of action in its entire scope and meaning.

¹ *Hoops vs. Atkins*, 41 *Ga.*, 109. (The designation in the declaration of a written promise to pay sued on, as a promissory note which is technically not a promissory note, does not render the declaration demurrable. Judgment reversed on above grounds.)

Orr Water Co. vs. Reno Water Co., 19 *Nev.*, 60. (Allegation of express contract to keep in repair a water-ditch; neglect to do so; and that plaintiff had paid for repairs a certain sum, which sum was paid "to the defendant's use," and that "the defendant promised to pay the same." *Held*, that these latter allegations might be regarded as surplusage and the plaintiff could recover damages for the breach of the contract. A good cause of action is not destroyed by adding immaterial matter, and a party is not estopped or concluded by a mistaken averment of law in his pleading.)

Murphy vs. McGraw, 74 *Mich.*, 318; s. c., 41 *N. W.*, 917. (The averment of an offer to return, not accepted, in an action for breach of warranty, if the right of return did

not exist at law, is surplusage which does not vitiate the complaint.)

Reynolds vs. Chicago & A. R. Co., 85 *Mo.*, 90. (Mistake in alleging maximum legal rate of charge under a public act, disregarded.)

Wilcox vs. Bates, 45 *Wis.*, 138. (A defendant held to be a trustee for the plaintiff for certain lands was charged on accounting with the rental value as distinguished from the actual receipts. On appeal, *held*, although the answer stated that use and occupation was worth a less sum than that stated by plaintiff, it did not estop defendant to deny that rental value was the measure of damages, and from insisting on the proper rule, as the issue on that point tendered and accepted was immaterial. Judgment reversed.)

§ 97. *Immaterial allegations not regarded.*—If the pleading state facts constituting a cause of action or defence, unnecessary allegations, even though of insufficient evidence, cannot make the pleading bad on demurrer.¹

Pierce vs. Town of St. Anne (C. Ct. N. D. Ill.), 30 *Fed. Rep.*, 36. (Complaint on town bonds, after alleging the compliance with the conditions precedent to their issue, set forth the town clerk's certificate of the facts. *Held*, not demurrable because the clerk's certificate insufficiently stated the facts; the other allegations being sufficient, the certificate was merely surplusage.)

De Martin vs. Albert, 68 *Cal.*, 277; s. c., 9 *Pac. Rep.*, 157. (An addition to allegations constituting a sufficient cause of action for trespass, of a further allegation "contrary to the statute" [citing it], may be disregarded, on demurrer.)

Marix vs. Stevens, 10 *Colo.*, 261; s. c., 15 *Pac. Rep.*, 350. (Complaint stated terms of lease, and then alleged "that defendant so leased and rented, and had the right to the possession, and to the use and enjoyment at all times during the term." Demurrer because it failed to show whether the defendant used and enjoyed the premises, or merely had the right thereto, overruled. *RISING, C.*, said: "The facts admitted by the demurrer are that the defendant leased of the plaintiff certain realty, for a definite term, at an agreed rent, and that said rent is due and unpaid. The other allegations constitute no part of the facts upon which the cause of action rests.")

State of Conn. *vs.* New Haven & Northamp. R. Co., 37 *Conn.*, 153, 165. (Mandamus to compel the stopping of trains at a station. The statutes made the abandoning of a station a question for the railroad commissioners. *Held*, that defendants' allegation that they found judicious management and the public interests required an abandonment did not tender an issue, and were therefore not admitted by demurrer.)

King *vs.* Enterprise Ins. Co., 45 *Ind.*, 43; Hayden *vs.* Anderson, 17 *Iowa*, 158; Ward *vs.* Ward, 5 *Abb. Pr. N. S.*, 145.

s. P., Boyle *vs.* City of Brooklyn, 71 *N. Y.*, 1., rev'g 8 *Hun*, 32. (Complaint to remove an assessment as a cloud on title for facts not appearing on the record, good although it disclosed also facts which did appear on the record and made the assessment void.)

§ 98. *Various grounds for same recovery.*—If the facts stated entitle plaintiff to any of the relief which is demanded, the complaint is not demurrable for not indicating whether he relies upon those facts in the aspect of a tort, or a contract, or an equitable right.

[See also next section and note.]

Hale *vs.* Omaha Natl. Bk., 49 *N. Y.*, 626, 632; rev'g 33 *N. Y. Super. Ct. (J. & S.)*, 40. (Complaint stating facts which might sustain a legal claim for conversion or for money had and received, or an equitable claim to reach a specific fund in defendant's hands, *held*, not demurrable because only a money judgment was demanded by way of damages. ALLEN, J., says: "The fact that, after the allegation of the facts relied upon, the plaintiff has demanded judgment for a sum of money by way of damages, does not preclude the recovery of the same amount upon the same state of facts by way of equitable relief. The relief in the two cases would be precisely the same; the difference would be formal and technical. If every fact necessary to the action is stated, the plaintiff may even, when no answer is put in, have any relief to which the facts entitle him consistent with that demanded in the complaint. Citing Bradley *vs.* Aldrich, 40 *N. Y.*, 504.)"

[This is in accord with the practice which allows a plaintiff, within reasonable limits, to develop several lines of proof, and go to the jury upon instructions respectively adapted to recovery upon either ground.]

[But when incidental equitable relief is essential in order to justify granting legal relief asked for, as, for instance, reformation of a contract in order to recover on it, the demand of relief is material.]

§ 99. *Alternative grounds*.—A complaint is not necessarily bad on demurrer because it is not clear which of two states of facts will be substantiated as the ground of liability for the same recovery, if sufficient facts are stated to show that one or the other is true.

Everitt vs. Conklin, 90 *N. Y.*, 645. (*Held*, that, in an action for money received, plaintiff may state the facts equitably entitling him to recover back the money, although they involve inconsistent alternatives, if on either view his claim is good ; as for instance : because I made and paid a note for his accommodation ; and, even if it should be found, as he is likely to claim, that the note was applied on a land contract, still I insist that my cause of action remains, and the money was mine and not his, because I rescinded that contract as I lawfully might, and so am still entitled to recover for money had and received. FINCH, J., said : “ We can see no impropriety in such a mode of pleading. It states all the facts, and states them consistently with one cause of action, and one right of recovery, whether the facts out of which it arose are found to be in accord with either the plaintiff’s or the defendant’s version of them.”

Milliken vs. Western Union Tel. Co., 110 *N. Y.*, 403, rev’g 53 *N. Y. Super. Ct. (J. & S.)*, 111 ; sustained a complaint against demurrer, on the ground that the complaint stated a good cause of action, either upon the contract made by defendant with plaintiff’s agent in France, or upon the agreement with plaintiff in New York.

s. p., *Chatfield vs. Simonson*, 92 *N. Y.*, 209, 217. (Holding that an answer is not demurrable for not stating whether facts are to be used as showing want of consideration, or as a recoupment of damages, nor for misstating the theory.)

Floyd vs. Patterson, 72 *Tex.*, 202 ; *s.c.*, 10 *South West. Rep.*, 526. (Where it is difficult to determine whether the liability of one of two defendants is to be considered resting on his relation with the other as agent or as partner, it is not demurrable to allege that he is either the one or the other, when the liability would be the same either way.)

In admiralty a charge in the alternative each branch of which constitutes an offence which is a complete ground of forfeiture, is good. The *Emily*, 9 *Wheat.*, 381. (Libel charging in the alternative preparation for slave-trade, and causing to sail.) The Court say: "It is said that this mode of alleging two separate and distinct offences leaves it wholly uncertain to which of the accusations the defence is to be directed. This objection, if entitled to consideration, would apply equally to an information laying each offence in separate count. This might undoubtedly be done; and yet no one interested in the proceedings could know to which accusation to direct his defence. This kind of uncertainty is no objection even to an indictment at common law. Distinct offences may be laid in separate counts, and the accused may not know upon which he is to be tried."

The English pleading rules and the Mass. Practice Act have each expressly sanctioned to some extent alternative allegations. 1 *Chitt. Pl.*, 16 *Am. ed.*, *260.

[In a note in 24 *Abb. N. C.*, 326, I have collected and discussed the cases more at length than space allows here; and have ventured to draw the following conclusions: I. A plaintiff who has several grounds for the same recovery upon the same transaction or subject-matter may state each as a separate cause of action demanding only one recovery therefor, unless one requires an allegation absolutely inconsistent as matter of fact with an allegation in another.

II. If such inconsistency be involved, then if the inconsistency is in respect to a matter not presumably within his knowledge, nor within his means of knowledge in advance of the trial, and is such that disagreement of the jury upon a special question respecting the point would not impair a general verdict in his favor, he may state the several grounds in the alternative in a single cause of action, provided he does not unnecessarily embarrass the defence, nor leave the defendant unreasonably in the dark as to what questions of fact he must be prepared to try.]

[*Contra*, *Kewaunee County vs. Decker*, 30 *Wisc.*, 624, insisting that on demurrer the Court should not tolerate a pleading made to subserve the purpose of two or more dissimilar causes of action at the option of the party presenting it.]

[*Contra* also, in California. See *Hagely vs. Hagely*, 68 *Cal.*, 348; s. c., 9 *Pacif. Rep.*, 305.]

§ 100. *Alternative version and relief, not demurrable.*
—A bill in equity,¹ or a complaint under the New Procedure in a cause of equitable nature² is not insufficient because, while stating facts upon which relief is claimed, it also indicates the version of the defendant, and asks for other relief appropriate to the case if such version be sustained by the Court, even though the alternative relief be inconsistent with that first asked.

¹ *Hardin vs. Boyd*, 113 *U. S.*, 756. (Bill by heirs and administrators of a vendor of land by title bond, alleging that the bond had been obtained by fraud, and that the land had not been fully paid for, and praying that the bond be cancelled ; that an account be taken of the rents and profits ; that complainant's title be quieted ; and for general relief. *Held*, proper to allow plaintiffs to amend the prayer so as to ask in the alternative for a decree for the balance of purchase-money and a lien to secure payment. This did not make a new case, but only enabled the Court to adapt its relief to that made by the bill and sustained by the proof. [Limiting and in part overruling *Shields vs. Barrow*, 17 *How. (U. S.)*, 130.]

Western Ins. Co. vs. Eagle Fire Ins. Co., 1 *Paige*, 284. (Bill by mortgagees against prior mortgagees to have premises sold subject to prior mortgages, etc.; or that complainants might redeem ; or that the whole interests might be sold and complainants paid after paying the prior mortgages. *Held*, that, the complainants being entitled to at least one of the three kinds of relief, demurrer was not sustainable.)

Korne vs. Korne, 30 *W. Va.*, 1 ; s.c., 3 *South East. Rep.*, 17. (Bill to set aside for fraud, etc., deed, and contract to support grantor, in consideration thereof. Prayer in the alternative that defendants be compelled to repay certain money, and pay annually to complainants a sum sufficient for their support: demurrer for multifariousness. *Held*, that a bill in equity is not multifarious because it prays an alternative relief inconsistent with the specific relief asked for. Whether a bill is multifarious must be determined from the frame and structure, not from the prayer. If the specific or alternative relief asked is inconsistent with the averments, the same will be disregarded, and relief given under the prayer for general relief if there is such a prayer.)

Rawlings vs. Lambert, 1 *Johns. & Hem.*, 458. (Plaintiff, in his bill, prayed an account of what was due to plaintiff and other creditors, and for administration of the estate, of the testator; or if it should be determined that plaintiff, as between himself and testator's widow, was a partner, then for an account of the partnership dealings. *Held*, on demurrer for multifariousness, that one has no right to allege two inconsistent states of facts and ask relief in the alternative, for the two cannot be true; but it is allowable to state the facts and ask the conclusion of the Court on those facts, and say the Court may come to one conclusion of law or to another. The Court may be asked to come to a conclusion on the facts disclosed, having stated everything that will enable the Court to form a proper judgment. For any bill may ask the judgment of the Court on two alternatives.)

Robinson vs. Cropsey, 2 *Edw. Ch.*, 138. (A bill of double aspect, seeking alternative relief, not improper, and complainants not necessarily chargeable with costs on failing.)

Story's Equity Pleadings, 39. He says: "Where each branch of the alternative relief prayed is complete in itself, the defendant cannot protect himself from answering on the ground that one branch of the relief is demurrable, for that would amount to a demurrer to the whole bill." [Citing *Marsh vs. Keith*, 1 *Drew & Sm.*, 342.]

Puterbaugh's Mich. Chan., 2d ed., 32. (Saying if the complainant "has doubts as to the relief he ought to have, he should frame his bill in a double aspect, so that if the Court should decide against him in one view of the case, it may yet afford him assistance in another, . . . which may be inconsistent with the former." *Id.*, 21, citing *Varick vs. Smith*, 5 *Paige*, 137; *Murphy vs. Clark*, 1 *Sm. & M.*, 221; *Barnes vs. McGee*, *id.*, 208; *Hart vs. McKeen*, *Walk. Ch.*, 417.)

Contra, *St. Louis, etc., R. R. Co. vs. Terre Haute, etc., R. R. Co.*, 3 *Ry. & Corp. L. J.*, 293. (Suit to cancel a lease as *ultra vires*, or, if valid, to have an accounting. *Held*, bad for multifariousness, because it contained two distinct grounds, one for rescission as void, the other to enforce as valid.)

[*Contra* also, *Micon vs. Ashhurst*, 55 *Ala.*, 607. Bill in the alternative bad unless plaintiff's ignorance or need of discovery appeared.]

[*Compare* also, *Bogat vs. Easton*, 37 *L. T. Rep., N. S.*, 266.

(Allegation of deceit in inducing formation of copartnership, and asking cancellation of articles and repayment ; or, in the alternative, accounting and dissolution. *Held*, on motion, inconsistent, and plaintiff must elect.)]

* *Wood vs. Seely*, 32 *N. Y.*, 105, 112. (Complaint praying that widow be barred from claiming dower in land which her silence permitted plaintiff to purchase, or that she be adjudged to contribute an equitable portion of the money he had paid, *held* not demurrable.)

Thus *Henderson vs. N. Y. Cent., etc., R. R. Co.*, 78 *N. Y.*, 243, 428, sustains the right of one suing for redress against an unauthorized use of a highway by a railroad company, to demand not only damages and an abatement and removal of the track, but also an injunction "against the running of trains, or if defendants are permitted to use the track, to do so only on condition that plaintiff be first paid his damages.

Van Rensselaer vs. Layman, 10 *How. Pr. (N. Y.)*, 505. (Complaint against two joint assignees of a lease in fee for the whole rent, alleging that plaintiff did not know what their interests were, and asking a joint or several judgment as should prove just. *Held*, a separate judgment could be rendered against each where it was proved at the trial that the defendant's interests were several. Court say : " Before the action for discovery was abolished by the Code (§ 389), a bill would have been properly filed on the facts of this case for a discovery ; but according to the present practice, the plaintiff could only allege facts as far as they were in his knowledge, and then obtain a discovery by examining the defendants as witnesses upon the trial.)

§ 101. — *by trustee of a special trust.*—A party who is before the Court as a trustee, or officer of the Court, and is seeking protection for the fund, or instructions in the performance of his duties as such, may, so far as necessary for the purpose, allege alternative claims of fact or of law, or both, and ask alternative relief.

Common practice.

Birdseye vs. Smith, 32 *Barb.*, 217.

B. *Legal or Equitable Cause.*

§ 102. *Jurisdiction.*—The rule that a demurrer on the mere ground of insufficiency does not enable the demurrant to raise the objection that the Court has not jurisdiction,¹ does not apply to the objection that a cause of action pleaded as a ground for equitable relief is not within the peculiar jurisdiction of a court of equity, as distinguished from a court of law.²

¹ *Drake vs. Drake*, 41 *Hun* (N. Y.), 366. (The want of jurisdiction cannot be raised, notwithstanding the general principle that the jurisdiction of the Court may always be questioned, as nothing can be considered on demurrer except the ground specified.)

To same effect *Wilson vs. Mayor*, 6 *Abb. Pr.*, 6; s. c., 15 *How. Pr.*, 500.

Whitewater R. R. Co. vs. Bridgett, 94 *Ind.*, 216.

For a qualification of this rule see note on p. 1.

² *Hotchkiss vs. Elting*, 36 *Barb.* (N. Y.), 38. (The failure to allege facts sufficient to present a proper case for the exercise of the equitable power of the Court to remove a cloud from title does not properly raise a question of jurisdiction, and may be considered on a demurrer for not stating facts.)

For other cases see §§ 110–117, *Demurrer by reason of adequate remedy at law.*

§ 103. *Equitable title.*—To give a court of equity jurisdiction the nature of the relief asked must be equitable, even when the suit is based on an equitable title. An equitable title is still equitable within the rule that equity may take jurisdiction, even after it has been established as a title by a decree in a suit brought for that purpose.²

¹ *Fussell vs. Gregg*, 113 *U. S.*, 550, 544. (Equitable title does not enable to sue in equity to eject mere trespassers.) [But see next section.]

Smith vs. Bourbon County, 127 *U. S.*, 105, and cases cited. (Holding that one whose right is that of an as-

signee cannot maintain a suit in equity merely because he cannot sue at law, for an action by the assignor would necessarily be an action for legal relief.)

[But if a remedy of an equitable nature is necessary, even though only as incidental, equity may take jurisdiction ; as of an interpleader, or of an action on contract where reformation is necessary as a preliminary to recovering a money judgment on the instrument as reformed.]

¹ *Phelps vs. Elliott*, 29 *Fed. Rep.*, 53.

§ 104. *Action for money or chattel*.—The fact that an action is for money,¹ or for possession of a chattel,² is not conclusive against equitable cognizance of it ; it is equitable if it rests on an equitable title only,³ or if sustainable in equity on grounds on which it could not be sustained at law.

¹ *Wetmore vs. Porter*, 92 *N. Y.*, 76, 80. (Complaint stating diversion of trust securities, such as would sustain a judgment for a conversion, or a decree for redelivery, with demand for damages, *held*, not demurrable for insufficiency.)

Rindge vs. Baker, 57 *N. Y.*, 209, 219 ; s. c., 15 *Am. R.*, 475. (Action to compel a payment due under a party-wall agreement. Prof. DWIGHT, Comr., instances also the vendor's action for price on an oral contract partly performed.)

² *Herrick vs. Throop*, 24 *Fed. Rep. Abst.*, 532 ; s. c., 32 *Alb. L. J.*, 356. (Bill to cancel illusory receipts for money as the price of a valuable trotting-horse, taken as if on a sale, and recover back the horse, as a pledge, upon payment of the loan.)

Western R. R. Co. vs. Bayne, 75 *N. Y.*, 1. (Action to recover back negotiable securities.)

Browne vs. Cochran, 46 *How. Pr. (N. Y.)*, 427. (Holding that to recover possession of a deed—since replevin, in which it might be retaken by defendant, is not a complete remedy at law—an action in equity may be brought.)

³ *Phelps vs. Elliott*, 29 *Fed. Rep.*, 53.

C. *Accounting.*

§ 105. *Mutual accounts.*—If a complaint for an accounting shows the existence of an unsettled mutual account between the parties,¹ as distinguished from an account on each side,² or an account on one side and payments thereon,³ a court of equity can take jurisdiction in its discretion.

The fact that the account is complicated is not alone enough to make an accounting in equity a matter of right.⁴

¹ *Willson vs. Mallett*, 4 *Sandf. (N. Y.)*, 112. (Holding that where the several demands between the plaintiff and defendant have no independent existence, but, as distinguished from the mere right of set-off, are so connected by the original contract or course of dealing that the only thing which either party can claim is the ultimate balance, the account is mutual, and an accounting may be had in equity. Demurrer overruled.)

White vs. Hampton, 10 *Iowa*, 238. (Courts of equity have undoubted jurisdiction in cases of mutual account upon the ground of the inadequacy of the legal remedy, as also for the purpose of avoiding multiplicity of suits.)

Ludlow vs. Simond, 2 *Cai. Cas. (N. Y.)*, 1, 38, 52. (Chancery has concurrent jurisdiction with courts of law in matters of account, and its jurisdiction extends to all matters of account between individuals in whatever relation they may stand to each other. It does not depend on the necessity for discovery, or to prevent the multiplicity of suits, or that difficulty would attend the remedy at law.)

Carr vs. Thompson, 87 *N. Y.*, 160. (In an action for an accounting the complaint substantially alleged that the defendant was employed as agent, and for a commission agreed to be paid him, in the purchase for the plaintiff of a specified kind of goods; that through a series of years he acted in that capacity, receiving and paying out on account of the plaintiff large sums of money; and that he had rendered at stated intervals accounts upon which settlements were had, and that the accounts so rendered were false, by means whereof

the defendant defrauded the plaintiff upwards of \$11,000. *Held*, although the remedy at law was complete, it was equally true that there was concurrent jurisdiction of this cause of action in equity. Whatever may have been its origin, whether founded upon the necessity for discovery or also upon the idea that complicated accounts could be with difficulty unravelled in a court of law, the jurisdiction of equity over actions of account was well settled. And that the action was within the provision of the Code of Civ. Pro., § 382, subd. 5, limiting the time for the commencement of "an action to procure a judgment other than for a sum of money.")

Porter *vs.* Spencer, 2 *Johns. Ch. (N. Y.)*, 169. (To sustain a bill for an account there must be mutual demands and not merely payments by the way of set-off. A single matter cannot be the subject of an account. There must be a series of transactions on one side and of payments on the other.)

Walker *vs.* Cheever, 35 *N. H.*, 339, 347. (To same effect.)

² Haywood *vs.* Hutchins, Ex'r of Hutchins, 65 *N. C.*, 574. (Plaintiff as a physician rendered professional services to the testator of the defendant, whilst the testator at various times had furnished agricultural products to the plaintiff. *Held*, in absence of an agreement between the parties that the cross-demands should constitute items of one account, such demands could only be considered matters of set-off, and there was no mutual account between the parties entitling the plaintiff to proceed in equity. Demurrer sustained.)

³ Walker *vs.* Cheever, 35 *N. H.*, 339, 347. Where the accounts are all on one side, and no discovery is asked or required by the frame of the bill, the jurisdiction will not be maintained. Bill sustained on other grounds.

⁴ Uhlman *vs.* N. Y. Life Ins. Co., 109 *N. Y.*, 421, 434. The mere fact that the account is complicated does not in all cases oblige the Court to take equitable jurisdiction. It is a matter largely within the discretion of the Court; and considering the fact that a plaintiff has now all the facilities for examining a complicated account in an action at law that he would have in equity, if it appears from all the circumstances that it would be of very great inconvenience and possible oppression to the defendant to take the accounting in equity, the plaintiff will be remitted to his action at law.

Fowle *vs.* Lawrason's Ex'r, 5 *Pet. (U. S.)*, 495, 503. (MARSHALL, Ch. J., says: "In all cases in which an action of account would be the proper remedy at law, and in all

cases where a trustee is a party, the jurisdiction of a court of equity is undoubted. It is the appropriate tribunal. But in transactions not of this peculiar character, great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction. 1 *Mad. Chanc.*, 86; 6 *Ves.*, 136; 9 *Ves.*, 437. In the case at bar these difficulties do not occur. The plaintiff sues on a contract by which real estate is leased to the defendant, and admits himself to be in full possession of all testimony he requires to support his action. The defendant opposes to his claim, as an offset, a sum of money due to him for goods sold and delivered, and for money advanced, no item of which is alleged to be contested. We cannot think such a case proper for a court of chancery.”)

[*Compare Crossly vs. City of New Orleans*, 20 *Fed. Rep.*, 352 (*U. S. C. Ct., E. D. La.*), holding that if an account is complicated so as to be incapable of being had at law, it is of itself a ground for equitable jurisdiction, especially when it must be followed by apportioning and distribution of the fund.]

[*Pacific R. vs. Atl. & P. R. Co.*, 20 *Fed. Rep.*, 277 (*U. S. C. Ct., D. Mass.*) An accounting maintained in equity between two railroads because of complexity, when the plaintiff's road had been leased to the defendant under an engagement to pay interest and dividends of the plaintiff out of the receipts from the leased road.]

§ 106. *Existence of fiduciary relation or necessity for discovery.*—If the complaint for an accounting shows a trust,¹ or other fiduciary relation,² or a right and necessity to have a discovery where it can be had in equity and cannot be effectually had at law, the complainant has a right to have an accounting in equity.*

Otherwise if the trust has ceased, or is only an implied trust, so that an action for money received would be an adequate remedy.⁴

¹ *Marvin vs. Brooks*, 94 *N. Y.*, 71, 75. (Reversing judgment which refused to compel an agent entrusted with money for a specific purpose to account in equity as to the purchase of stocks and bonds for account of both.

FINCH, J., says: "Such decree proceeds upon the ground that the defendant stands in the attitude of an agent dealing to some extent with the money and property of the other party, entrusted in a confidential relation with an interest which makes him a quasi trustee, and by reason of that relation knowing what the other party cannot know and bound to reveal to him the entire truth. The equitable jurisdiction has always rested largely upon such confidence involving the need of discovery and the duty of explanation, and hence the burden of such explanation and the proof of its truth fell in such cases upon the defendant whose conduct was questioned whenever an accounting was decreed and required of them the extreme of good faith.")

* *Cochrane vs. Adams*, 50 *Mich.*, 16; s. c., 14 *N. W. Rep.*, 681. (Accounting maintained in equity under an agreement to share the proceeds from the sale of certain lumber under circumstances creating a trust but not amounting to a partnership. The right of accounting in equity is incident to most trust relations, and is not cut off by waiver of an answer under oath. Unless it is clear from the complaint that the plaintiff is already fully informed of his rights, he has a right to an accounting, although the averments are somewhat full as to the particular items of money due. Demurrer overruled.)

* *Darrah vs. Boyce*, 62 *Mich.*, 480; s. c., 29 *North Western Rep.*, 102. (Contract by defendant to manufacture lumber supplied by plaintiffs and sell for the best interests of both parties, and after deducting advances, expenses, and commissions to pay over the residue. *Held*, that, though not a partnership, the relation was fiduciary. SHERWOOD, J., said: "He [defendant] was in possession of all the books and accounts relating to the business, and refused to give any account of sales, or of the place where made, or the amounts received on sales. Some sort of discovery is certainly necessary, and while, to some extent, it may be obtained in a court of law, perfect and complete disclosure as to all these matters may be obtained in a court of equity. In this class of cases the form of the action should not be made to depend entirely upon the fact that the complainant has a remedy at law, but whether or not such remedy is adequate, and will do full justice between the parties. Technicalities should never be allowed to control in such cases, where the effect will be to impair or destroy substantial rights, but that form of action should be allowed and adopted which will best accomplish the

ends of justice. These views are carefully maintained by this Court in *Cochrane vs. Adams*, 50 *Mich.*, 16; s. c. 14 *N. W. Rep.*, 681; *Merritt vs. Dickey*, 38 *Mich.*, 44; *Ramsdell vs. Millerd*, *Har. Ch.*, 373; *Heath vs. Waters*, 40 *Mich.*, 457; *Flanders vs. Chamberlain*, 24 *Mich.*, 314; also in *Pom. Eq. Jur.*, § 1412, note 1, and case cited; *Foley vs. Hill*, 2 *H. L. Cas.*, 28; *Moxon vs. Bright*, 4 *Ch. App.*, 292; *Marvin vs. Brooks*, 94 *N. Y.*, 71.")

Getty vs. Devlin, 54 *N. Y.*, 403. Subscribers to an agreement for the purchase of property for their mutual benefit and advantage stand in the relation of confidence and trust with each other, implying mutuality and equality in burdens and benefits; and where some of the subscribers have taken to themselves secret and separate advantages to the prejudice of their associates, their associates may compel them to account in equity for what they have thus fraudulently appropriated.

Dyckman vs. Valiente, 42 *N. Y.*, 549, 563. (In all cases where it is necessary that an accounting should be had to ascertain the rights of part owners of a ship, equity has jurisdiction in like manner as between partners.)

Watts vs. Adler, 13 *N. Y. State Rep.*, 553. (Where a co-partnership is dissolved and the accounts are unsettled, an accounting in equity is proper. Although under the present practice an accounting cannot be had in equity merely on the ground that a discovery is needed, the right of a party to come into equity for the settlement of copartnership accounts has never been questioned.)

In the following cases accounting was denied because no fiduciary relation was held to exist: *Haskins vs. Burr*, 106 *Mass.*, 48. (Accounting for the profits of a partnership denied because the agreement, set forth in the bill, to enter into a partnership was executory and the remedy for its violation was an action for damages at law.)

Salter vs. Ham, 31 *N. Y.*, 321. (Where a partnership does not exist, but the relation is merely that of debtor and creditor, an accounting cannot be had in equity.)

Hemings vs. Pugh, 4 *Giff.*, 456. (The bill alleged that the defendant had received on the plaintiff's account numerous sums of money of which the amounts and particulars were unknown to the plaintiff; that it was the duty of the defendant to have accounted for and paid such sums received by him aforesaid. On demurrer, *held*, the bill contained a mere averment of the receipt of money by an agent, but that has never been

held enough to sustain a bill. There must be allegations showing the fiduciary relations between the parties.)

Foley vs. Hill, 2 *H. L. Cas.*, 28. (Holding that the relation of banker and customer was not of a fiduciary character, but simply that of debtor and creditor, and that an account could not be maintained.)

**Frue vs. Loring*, 120 *Mass.*, 507. (Bill charged that the defendant as trustee appropriated to his own use certain shares of stock held in trust. The stock was alleged to have been held by the defendant until paid for by the plaintiff, and that the plaintiff had overpaid the amount due. The prayer was for an accounting for the balance of the overpayment and the value of the stock. No discovery was prayed for. *Held*, the demurrer should be sustained. The claim was only for money damages for conversion. COLT, J., says: "The jurisdiction of equity extends, it is said, equally to express and implied trusts; and yet it has never been contended that it embraced all such cases of implied trust as arose out of the relations created by a pledge or mortgage of personal property, or a transfer of choses in action, or shares in a corporation to be held as collateral security for the payment of money, or which might arise between principal and agent or between bailor and bailee, unless there were facts alleged showing either the need of discovery in support of the bill or relief in some form peculiar to courts of equity.")

Miller vs. Kent, 16 *Fed. Rep.*, 13. (Action for an accounting. The bill alleged that the defendants withheld five distinct sums of money deposited with them as commission merchants by the complainants, to be held subject to their order, and that the defendants had used the money for their own purposes, and had profited thereby. There was no prayer for discovery. *Held*, if the moneys were misappropriated in violation of some active trust between the parties involving confidence on the one side and discretion on the other, or if there were mutual accounts between the parties, or even an account on one side of a nature to justify a bill of discovery, there might be a case of equitable cognizance; but upon the facts alleged, the complainants have adequate remedy at law and the demurrer should be sustained.)

Crooker vs. Rogers, 58 *Me.*, 339. (Action for accounting cannot be maintained in equity simply because it is alleged that the defendant holds money in trust for the plaintiff which in good faith and conscience ought to be

paid to the plaintiff. It is not every case of trust that is cognizable in a court of equity. Trusts embrace a wide field, and in most cases a remedy may be sought in a suit at law. An action for money had and received is a simple, complete, and expeditious remedy.)

Bay City Bridge Co. vs. Van Etten, 36 *Mich.*, 210. (The complaint alleged that the defendants, while directors of the plaintiff, a corporation, fraudulently voted to themselves moneys for services performed as officers of the plaintiff. The defendant demurred; demurrer was sustained upon appeal. COOLEY, Ch.J., in affirming judgment of the court below, says: "Officers of a corporation undoubtedly act in a fiduciary capacity, and may be called to account in equity as trustees. But when they have ceased to be officers and the only complaint made against them is of an appropriation of the corporate funds to their own use and no discovery is sought, the reasons for seeking aid of equity which commonly exist in cases of breach of trust are wholly wanting. The courts of law are perfectly adequate to give effectual relief, and they are the most suitable tribunals for the purpose.) [*Compare* note in 20 *Abb. N. C.*, 441.]

Witter vs. Brewster, 12 *N. Y. Weekly Dig.*, 358; mem. s. c., 24 *Hun*, 601, opin. not rep. (An action for an accounting cannot be maintained against a guardian for moneys retained by him after his wards have reached majority, where the amount is fixed and determined. BOARDMAN, J., says: "It was his duty to provide for its payment, and pay the same to them at their majority." . . . It was payable as effectually as a note so payable. His retaining the money after that was a breach of his implied promise or undertaking. He received it to be paid at a certain fixed time. After that time the defendant was the debtor of the plaintiff. He had no right to retain the money from the plaintiff. He had no active duty to perform except to pay it over. There was therefore no trust and no relation of trustee and *cestui que* trust. There was no subject for an accounting. It was a debt due. (12 *Johns.*, 276; 42 *N. Y.*, 456.) That the right of action at law exists in such a case see 5 *Duer*, 168, 176. We conclude that no question of trust requiring an accounting existed giving jurisdiction to equity, and that as a consequence the six years statute of limitations applied and barred this action."

County of Clinton vs. Schuster, 82 *Ill.*, 137. (The action was brought for an accounting against the defendant as

county assessor and treasurer for fees and emoluments received by him, over and above his salary, which by law he was bound to pay over to the county (the plaintiff). Complaint dismissed on demurrer because the complainant had a complete and adequate remedy at law. There was no reason for discovery, as the fees and emoluments were a matter of record.)

Ramsay vs. County of Clinton, 92 *Ill.* 225. If money paid by a county to the clerk be recoverable back by the county, the action at law for money had and received is a full and adequate remedy, and where no fraud is shown a resort cannot be had to a court of equity.

§ 107. — *remedy at law*.—Where there is no trust nor fiduciary relation, nor a right to have an equitable apportionment coupled with a necessity for the intervention of the Court to make such apportionment, neither the mere fact that the accounts are complicated nor the fact that discovery is necessary, makes resort to an action of an equitable nature matter of right under the codes ; because mere complication of accounts at most makes it discretionary with a court of equity whether to take jurisdiction ; and under the codes, discovery can be had equally well in an action of a legal nature.

Uhlman vs. N. Y. Life Ins. Co., 109 *N. Y.*, 421, 433. (Action by tontine policy-holder to compel company to account, dismissed on this ground, after trial and judgment for plaintiff. English decisions reviewed.)

Marvin vs. Brooks, 94 *N. Y.*, 71, 81 (before cited.)

FINCH, J., said : “ The best considered review of the authorities puts the equitable jurisdiction upon three grounds, viz.: the complicated character of the accounts ; the need of a discovery ; and the existence of a fiduciary or trust relation. (1 *Story's Eq. Jur.*, § 459, and note 5.) The necessity for a resort to equity for the first two reasons is now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account, too complicated for the handling of a jury, and furnishes, by an examination of the adverse party before trial, and the production and deposit of books and papers, almost as complete a means of discovery as could be furnished by a court of equity. But the jurisdiction of the latter court over trusts and

those fiduciary relations which partake of that character remains, and in such cases the right to an accounting seems well established. But the existence of a bare agency is not sufficient. If it was, it would draw into equity every case of bailment in which an account existed."

§ 108. *Royalty contracts*.—The mere existence of a stipulation to pay a royalty on one's own transactions, without anything to indicate a trust or confidence in the fidelity of the party so contracting, is not ground for maintaining an action for an accounting in equity.¹

Otherwise where the contract was such that one party was entrusted with the duty of keeping an account of the transactions, according to which complainant's right was to be measured.²

¹ *Moxon vs. Bright*, *L. R.*, 4 *Ch. App.*, 292. (Holding that although there are numerous cases where the relation of principal and agent had imposed a trust upon the agent, the Court would entertain a bill for an account. Yet the difficulty was in determining what constituted this species of trust. It is not every agent who holds a fiduciary position as between himself and his principal. Thus a patentee agreed with a machine-maker that the machine-maker should make machines according to the patent and sell them, taking a certain sum upon each machine for himself and paying to the patentee as a royalty the amount charged for the machines above that sum. The patentee cannot maintain a suit in equity for an account against the machine-maker as his agent.)

Smith vs. Ogilvie, 5 *N. Y. Supp.*, 382.

[*Compare Somerby vs. Buntin*, 19 *Am. Rep.*, 459; s. c., 118 *Mass.*, 279. (Specific performance: holding that an agreement as to invention and letters patent is capable of being enforced in equity by compelling an assignment, an account, and such other relief as the circumstances of the case require.)]

² *Appeal of Bovaird* (*Pa.*, 1886), 5 *Atl. Rep.*, 26; s. c., 4 *Cent. Rep.*, 40

Bentley vs. Harris, 10 *R. I.*, 434; *Harrington vs. Churchward*, 29 *L. J. Ch.*, 521; s. c., 8 *Weekly Rep.*, 302 (sustaining bill by one employed on a share of profits to

have an accounting); Appeal of Adams, 113 *Pa.*, 449 ; s. c., 9 *Eastern Rep.*, 137 (patentee against licensee).

§ 109. *Facts showing grounds for equitable cognizance to be specifically alleged.*—Facts showing that the transactions or the relations of the parties are of such a nature as to make a case of equitable jurisdiction, to maintain the action for an accounting should be specifically alleged. A general allegation of their character is not sufficient.

Badger *vs.* McNamara, 123 *Mass.*, 117. (Demurrer sustained for want of such facts.)

D. *No Adequate Remedy at Law.*

§ 110. *Form of Demurrer.*—Under a demurrer assigning as ground that the complaint does not state facts sufficient to constitute a cause of action, the objection that there is a plain, adequate, and complete remedy at law is available,¹ unless legal relief is demanded besides the equitable relief, and the action ought to be sustained as for legal relief.²

In equity, a demurrer assigning as a ground that the bill does not show that there is no adequate remedy at law is sufficient without suggesting what particular allegations are needed in order to show the want of such remedy.³

¹ Hotchkiss *vs.* Elting, 36 *Barb.*, 38. (Action to remove cloud from title.)

² If this be the case, to sustain the demurrer would be to sanction a demurrer to relief.

³ Witherell *vs.* Eberle (*Ill.*, 1888), 14 *North East. Rep.*, 675.

§ 111. *Showing want of adequate remedy.*—A complaint asking only¹ equitable relief is demurrable if the facts stated are such that there is a plain, adequate, and complete remedy at law.²

If the jurisdiction is concurrent, the facts stated must show that there is not such a remedy.³

¹ If the complaint asks legal relief, it is not bad on demurrer because of also asking equitable relief.

² *Lynch vs. Willard*, 6 *Johns Ch. (N. Y.)*, 342. (Demurrer lies if plaintiff by his own showing has an effectual and complete remedy at law, and sets up no particular title to the aid of a court of equity. Bill by attorneys and solicitors for an account of payments and services for the defendants and others, on request made on behalf of all the creditors of an insolvent debtor, therefore dismissed on demurrer.)

³ *Avery vs. Ryan*, 74 *Wisc.*, 591; s. c., 43 *Northwestern Rep.*, 317, 320. (Damages being an adequate remedy for breach of contract as to personal property,—here to form a corporation,—a complaint for specific performance of such a contract, or, in the alternative, compensation for the value of the stock, *held* bad on demurrer. Whether a remedy to be had only by resort to the courts of another State is adequate, Query?)

Moore vs. Townshend, 102 *N. Y.*, 387. (Complaint for the cancellation and delivery of a conveyance under which defendant occupies premises, as a cloud upon plaintiff's title, *held*, that as the facts showed presumptively that there was a remedy at law, the complaint must show why the plaintiff could not obtain all the relief to which he was entitled by an action of ejectment, and failing to do this it was insufficient.

Kip vs. N. Y. & Harlem R. R. Co., 6 *Hun*, 24. (Suit asking that proceedings in eminent domain be enjoined because the statute claimed to sanction them was unconstitutional. Judgment for demurrant affirmed in 67 *N. Y.*, 227, without questioning this point.

Whitehead vs. Entwistle, 27 *Fed. Rep.*, 778. (Bill to quiet title to real estate, where the allegations showed that the defendant was in possession, and ejectment might be maintained. *Dictum*, that the allegations must show that there is no adequate remedy at law.)

Jones vs. Newhall, 115 *Mass.*, 244. (Under the Massachusetts statutes limiting the Court in the exercise of the chancery powers conferred upon it to cases where the parties have not a plain, adequate, and complete remedy at law, a bill is demurrable, not only if it show that the plaintiff has a remedy at law equally sufficient and available, but also if it fail to show that he is without such remedy.)

Maguire's Appeal, 102 *Pa. St.*, 120; s. c., 15 *Reporter*, 698. (Reversing for error in not sustaining demurrer.) [In *Town of Mentz vs. Cook*, 108 *N. Y.*, 504, where it is said (p. 509) that the complaint would not have been demurrable, it must be noticed that the Court had previously said (p. 508) that the complaint sufficiently alleged facts showing a want of adequate remedy at law.]

See other authorities under *Accounting*.

As to what is deemed adequate within the rule, see § 116. If the language of the bill is equivocal, the presumption under Tennessee law will be in favor of rather than against the bill. *Kerr vs. Kerr*, 3 *Lea (Tenn.)*, 224. (Bill to reach property of a judgment debtor; an allegation that the defendant "has title" to certain real property will not be deemed to imply that he has legal title.)

The objection to the jurisdiction of a court of equity, on the ground that there is an adequate remedy at law, may be enforced by the Court *sua sponte*, though not raised by the pleadings or suggested by counsel. *Killian vs. Ebbinghaus*, 110 *U. S.*, 568. [Citing *Parker vs. Winnepiseogee Lake Cotton and Woollen Manuf'g Co.*, 2 *Black*, 545; *Lewis vs. Cocks*, 23 *Wall.*, 466.]

Under the Codes it has sometimes been held that the remedy is motion as to mode of trial, not demurrer. *De Bussierre vs. Holladay*, 4 *Abb. N. C.*, 111, 121; s. c., 55 *How. Pr.*, 210.

Independent School Dist. vs. Independent School Dist., 41 *Iowa*, 321.

If a plaintiff make out a *prima facie* case for the intervention of equity, by showing either that the tort will cause an injury which is specific, and which the person injured cannot specifically repair, and which cannot be paid for in money, or an injury the extent of which it is impossible to ascertain or estimate with any accuracy, he will be entitled to the interference of equity to prevent the commission of the tort; otherwise the remedy at law is adequate so far as regards the nature of the tort, unless the defendant can show that the damage which will be caused to him by the prevention of the act will so much exceed the damage which will be caused to the plaintiff by the doing of the act that the interference of equity will not be promotive of justice. Prof. LANGDELL, in 1 *Harvard L. Rev.*, 121;—adding: "If the defendant can show that, the plaintiff should, it seems, be left to his remedy at law. One objection to the interference of equity under such circumstances is that

it is not likely to have any other effect than that of compelling the defendant to purchase the plaintiff's acquiescence at an exorbitant price."

§ 112. — *in case of several grounds of relief.*—If the complaint states more than one ground for the same relief as a single cause of action, as for instance facts showing that an instrument is voidable and other facts showing that it is void, the existence of a plain, adequate, and complete remedy at law upon one ground does not render it demurrable if there is no such remedy upon the other ground.

Tillman vs. Thomas, 87 *Ala.*, 321 ; s. c., 6 *So. Rep.*, 151. (Bill by heirs to vacate order of sale confirmation. Held, that if either ground were sufficient, joining the other could not impair the bill.)

Boyle vs. City of Brooklyn, 71 *N. Y.*, 1, rev'g 8 *Hun*, 32. (Complaint to cancel assessment as a cloud on title, stating two defects, one of which did and the other of which did not appear on the face of the proceedings.)

§ 113. *Assignee.*—The common-law inability of an assignee of a cause of action to sue as such at law is not a sufficient ground to enable him to sue in equity.

Hayward vs. Andrews, 106 *U. S.*, 672 ; *N. Y. Guaranty & Indemnity Co. vs. Memphis Water Co.*, 107 *id.*, 205.

§ 114. *What is a "remedy at law."*—Whether a statutory action or special proceeding, or an ability to bring a legal action in another State, is a remedy "at law," within the rule, has not been fully settled. The better opinion is that a court of equity is not deprived of any inherent jurisdiction as such by the existence of a remedy conferred on a court of law by statute, unless the statute secures a right of trial by jury, nor by the fact that a citizen complainant might resort to a foreign tribunal, for so far as the objection that there is an adequate remedy at law is a matter of right on the part of

the defendant, it is founded on the right to trial by jury.² But the existence of such a statutory or foreign remedy is ground, in the discretion of the court, for refusing to exercise equitable jurisdiction.³

McConihay vs. Wright, 121 *U. S.*, 201. (The adequate remedy at law which is the test of equitable jurisdiction in the courts of the United States is that which existed when the judiciary act of 1789 was adopted, unless subsequently changed by Act of Congress, and is not the existing remedy in a State or Territory by virtue of local legislation.)

Breeden vs. Lee, 2 *Hugh. (U. S. Circ.)*, 484. (Statutory remedy at law does not take away equity jurisdiction.)

Commercial Nat. Bank of Ogden vs. Davidson (Oreg., 1889), 22 *Pacif. Rep.*, 517. (A statute providing for foreclosure of chattel mortgages by an action of a legal nature should not be construed by implication as taking away the general jurisdiction of a court of equity to entertain an equitable action for that purpose.)

Frey vs. Demarest, 16 *N. J. Ch. (1 U. E. Green)*, 236. (Chancery is not deprived of its original jurisdiction in any case, either by the operation of a statute conferring similar jurisdiction upon the common-law courts, or by the adoption in those courts of the principles or practices of a court of equity. [Citing *Atkinson vs. Leonard*, 4 *Bro. Ch. R.*, 218; *King vs. Baldwin*, 17 *Johns.*, 384; *Sailly vs. Elmore*, 2 *Paige*, 497; *Varet vs. N. Y. Ins. Co.*, 7 *Paige*, 560; *White vs. Medbury*, 2 *Edw. Ch. R.*, 486.])

² *Killian vs. Ebbinghans*, 110 *U. S.*, 568, 573; citing *Hipp vs. Babin*, 19 *How. (U. S.)*, 271.

³ Even a court of law may refuse her its discretion to entertain an action between transient persons on a foreign tort.

§ 115. *Statutory remedy in equity*.—A State statute giving a remedy in equity does not in the United States Courts take a case out of the rule that equity cannot be resorted to if there is a speedy, plain, adequate, and complete remedy at law.

Whitehead vs. Entwhistle, 27 *Fed. Rep.*, 778.
Compare *Van Norden vs. Morton*, 99 *U. S.*, 378.

§ 116. *What is a "plain, adequate, and complete" remedy.*—The tests as to whether the remedy at law is plain, adequate, and complete are the same in the courts of the United States¹ and other courts² acting under statutes which forbid the exercise of equity jurisdiction when such remedy exists, as it is in courts acting under the general principles of equity jurisdiction.

The remedy at law is not "*plain*," within the meaning of the rule, if there is serious doubt as to the existence of a legal remedy,³ or as to the construction of an instrument in one view of which there is no remedy at law, or as to the propriety of joining the parties at law,⁴ or as to the possibility of ascertaining the facts necessary to determine the strict legal rights of the parties.⁵

The remedy at law is not "*adequate*," within the meaning of the rule, if it is not adapted to ascertaining the facts, as where discovery is necessary and the court of law has not the power to compel it,⁶ or where an account to be taken is so complicated, or the parties with conflicting interests are so numerous,⁷ that justice could not well be done by jury trial.

The remedy at law is not "*complete*," within the meaning of the rule,⁸ if it could not redress all the wrongs, establish all the rights, and administer full relief in view of the transaction in question.¹⁰

The equity jurisdiction attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances.¹¹

But it is not enough to show that a remedy at law, theoretically clear, adequate, and complete, has been resorted to without success.¹²

¹ *Oelrichs vs. Spain*, 15 *Wall.*, 211, 227. (Section 16 of the Judiciary Act of 1789 is merely declaratory of the pre-existing rule, and does not apply where the remedy is

not "plain, adequate, and complete," or, in other words, where it is not as practical and efficient to the ends of justice and to the prompt administration as the remedy in equity.)

² See, for instance, Mass. cases stated below.

³ *Rathburn vs. Warren*, 10 *Johns.*, 588*, 595. (Bail was discharged by reason of an agreement between the debtor and creditor in violation of its terms. *Held*, that equity might afford relief and grant a perpetual injunction against its enforcement, the remedy at law being doubtful.)

⁴ *Ludlow vs. Simond*, 2 *Cal. Cas.*, 1, 39, 54. (Contract susceptible of two constructions, upon one of which there was clearly no remedy at law, and specific performance might be necessary.)

⁵ *Dole vs. Wooldredge*, 135 *Mass.*, 140. (Fraud on several associates in a mining enterprise by another associate who stood in a fiduciary relation. Bill for accounting sustained. The Court say: "If an action at law could be maintained, it is not plain whether the plaintiffs should join in the action or whether each should bring an action to recover the damages he sustained by the fraud. We have no doubt that, since the passage of the Statute of 1877, c. 178, this Court has jurisdiction in equity of this case; and, without determining absolutely that the plaintiffs have no remedy at law, we are of the opinion that their remedy at law is not so plain that we ought to deny them relief in equity.")

⁶ *American Ins. Co. vs. Fisk*, 1 *Paige*, 90. (In a suit arising out of the sale of a cargo of a wrecked vessel under the award of a "wrecker's court" of another State, it was contended that the plaintiff's remedy was an action of trover in a court of law. *Held*, the accidental obliteration of the mark upon the goods which rendered it impossible to ascertain to which of the various owners of the cargo the part saved belonged, together with the complicated rights of the parties in interest, made the plaintiff's remedy at law doubtful and difficult, and this alone would be sufficient.)

Carpenter vs. Carpenter, 40 *Hun*, 263.

Wood vs. Seely, 32 *N. Y.*, 105, 114, and cases cited. (Both holding that where title to real property is involved, if the removal of a cloud thereon depends on oral evidence, the party is not bound to take the hazard of its loss by awaiting an action at law, but may maintain a suit in equity.)

(Compare *Weil vs. Raymond*, 142 *Mass.*, 206; s. c., 6 *Eastern*

Rep., 402. (Holding that uncertainty as to who is the debtor, or whether attachable property belongs to the debtor, is not enough to sustain a resort to equity.)

⁷ *Sullivan vs. Portland, etc.*, R. R. Co., 94 *U. S.*, 806.

[And see § 94, *Accounting*.]

⁸ *Plummer vs. Connecticut Mut. Life Ins. Co.*, 1 *Holmes (U. S. Circ.)*, 267. (Demurrer overruled.)

⁹ Appeal of Brush Electr. Co., 114 *Penn. St.*, 574; s. c., 6 *Centr. Rep.*, 129. (With *dictum* that a bill may be sustained solely upon the ground that it is the most convenient remedy, citing *Kirkpatrick vs. McDonald*, 11 *Penn. St.*, 387.)

¹⁰ *De Bussierre vs. Holladay*, 4 *Abb. N. C.*, 111; s. c., 55 *How. Pr.*, 210.

Clark vs. Flint, 39 *Mass.*, 231, 237. (Specific performance lies against an insolvent though the contract relate to personalty.)

s. p., *Foll's Appeal*, 91 *Penn. St.*, 434.

Smith vs. City of Rochester, 38 *Hun.*, 612, 615. (Action for injunction sustained where a clear legal right was violated, but because no damage appeared, an action at law would not lie.)

1 *Story Eq. Jur.*, § 33, says: "The remedy must be plain; for if it be doubtful and obscure at law, equity will assert jurisdiction. It must be adequate; for if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity.

"And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time and in future; otherwise, equity will interfere and give such relief and aid as the exigency of the particular case may require."

¹¹ FULLER, C. J., in *Kilbourn vs. Sunderland*, 130 *U. S.*, 505.

See a note on the existence of a remedy at law, in Bigelow's ed. of *Story's Eq. J.* (13th ed.), 25.

¹² *Thompson vs. Allen County*, 115 *U. S.*, 550. (By inadequacy of remedy at law is meant not that it fails to produce money,—that is a very usual result in the use of all remedies,—but that in its nature or character it is not fitted or adapted to the end in view. The fact that the remedy at law by mandamus for levying and collecting taxes has proved ineffectual, and that no officer can be found to perform the duty of levying and collecting them, is no sufficient ground for jurisdiction in equity to enforce that collection.)

[For other cases on inadequacy of remedy at law as a

ground for resort to equity, see *Hammond vs. Morgan*, 101 *N. Y.*, 179; *McLane vs. Johnson*, 59 *Vt.*, 237; *Hammond vs. Morgan*, 51 *N. Y. Super. Ct.*, 472; *Barber vs. Barber*, 21 *How. (U. S.)*, 582; *Vilwig vs. Baltimore & Ohio R. R. Co.*, 79 *Va.*, 449; *Drexel vs. Berney*, 122 *U. S.*, 241; *Brooks vs. Howison*, 63 *N. H.*, 382; *Williams vs. Kiernan*, 25 *Hun.*, 355; *Somerville Comm'rs vs. Johnson*, 36 *N. J. Eq.*, 211; *Galveston & Harrisburg, etc., R. R. Co., vs. Hume*, 59 *Texas*, 47; *Spring vs. Domestic Sewing M. Co.*, 5 *N. J. L. J.*, 330; *Watson vs. Sutherland*, 5 *Wall.*, 74; *Leopold vs. Silverman*, 7 *Mont.*, 266; s. c., 16 *Pac.*, 580; *Appeal of Zell*, 126 *Pa. St.*, 329; s. c., 17 *Atl. Rep.*, 647, 658.]

§ 117. "*Jurisdiction clause*" directly alleging want of remedy.—A complaint which makes a case for which there is no plain, adequate, and complete remedy at law is not demurrable because it contains no direct allegation that the plaintiff has no such remedy.¹ If the complaint does not make such a case, such an allegation will not save it.²

Common Practice. The allegation would be a mere conclusion. In *Town of Mentz vs. Cook*, 108 *N. Y.*, 504, the facts showing want of remedy at law were specifically alleged in the complaint coupled with that conclusion, and the Court lay the stress on them (p. 508).

By the Rules of U. S. Practice in *Eq.*, No. 21, the plaintiff in a bill in equity may omit the allegation that the plaintiff is without any remedy at law, "and the bill shall not be demurrable therefor." This is in accord with practice under the Codes.

2 *Story Eq. Pl.*, 28, § 34.

Van West vs. Webster, 31 *Ohio St.*, 420. (Bill for injunction to prevent apprehended injury to real property. Judgment therefore reversed.)

Blaine vs. Brady, 64 *Md.*, 373; s. c., 22 *Centr. L. J.*, 36, with note. (Action to enjoin overflowing of lands.)

Thomas vs. Hall, 2 *Pearson (Pa.)*, 64. (A bill in equity was demurred to because it was not accompanied by counsel's certificate, as required by the Pennsylvania Act of October 13, 1840, that there was no adequate legal remedy, or that it would be attended with additional trouble, etc. *Held*, the demurrer was well taken, but it was overruled, the Court allowing the certificate to be added *nunc pro tunc*.)

§ 118. *Estoppel against this objection.*—A defendant who has successfully obstructed the complainant's remedy at law by a technical defence,¹ or by withholding evidence,² cannot defeat a suit in equity merely on the ground that the remedy was at law.

¹ *Radcliff vs. High*, 2 *Rob. (Va.)*, 271, holding that after voluntary dismissal of a suit at law on a plea of estoppel being filed, which complainant erroneously supposed would be good at law, complainant might sue in equity, on the ground that defendant having prevailed at law on the pretence there was no remedy there, could not now say that there was. Complainant sued at law for purchase-money; but defendant pleaded estoppel, consisting of the recital of payment in the deed, whereupon complainants discontinued and filed their bill in equity, but the Court dismissed it (on grounds not stated). *Held*, error. The answer in this suit admitted that defendant had not paid the debt, and (without deciding whether the defence at law should not have availed), yet defendant, by having used it there successfully, is estopped from urging that it should not have availed. Decree reversed, and decree for complainant for the debt.)

² *Sturtevant vs. Goode*, 5 *Leigh (Va.)*, 83. (Holding that voluntary dismissal at law by reason of being embarrassed by defendant's refusal to deliver to plaintiff the contract sued on, precluded defendant from claiming, when sued in equity, that there was a remedy at law. Upon plaintiff's being defeated in effort to obtain from defendant one of the duplicate copies of the contract sued on, he discontinued and filed bill in equity, setting up that ground. *Held*, error to sustain a demurrer to his bill on the ground that it was no case for equitable relief. Defendant cannot be permitted to drive his adversary from a court of law by withholding papers, and then drive him from chancery because he did not hazard a trial at law without the necessary papers.)

s. p., *Johnson vs. Roanoke Land and Impr. Co.*, 82 *Va.*, 284; s. c., 10 *Va. L. J.*, 538. (Complainant alleged a building contract, which was left in defendant's possession to have duplicates made, and that by reason of defendant's refusal to deliver it to him till all work was done, a provision that no work should be regarded as extra unless a separate estimate was made by him, was forgotten by him, and that in a suit by him on the

contract, evidence of extra work, necessitated by alterations in the plans made by defendant, had been excluded because of lack of such estimates, and he thereupon discontinued the suit and brought this bill, and that such extra work had been done in reliance on defendant's good faith and integrity; and the bill prayed for an account and for general relief. The bill was dismissed on demurrer. *Held* error. To keep plaintiff out of equity would permit defendant to take advantage of its own wrong. Decree reversed.)

E. *Contract or Tort.*

§ 119. *Uncertainty as ground of demurrer.*—In those jurisdictions where uncertainty is ground for demurrer, a complaint is demurrable which alleges both a contract and a tort, and does not indicate upon which plaintiff founds his claim to recover.

Statutes allowing demurrer if the complaint is “ambiguous, unintelligible, or uncertain” have been adopted in California, Colorado, Montana, and Nevada.

[For the *Contrary Rule* prevailing in most of the States see § 65.]

Munter vs. Rogers, 50 *Ala.*, 283. (Holding that if the complaint states facts which show a good cause of action for debt, to which is added averments on which an action on the case for deceit might have been maintained, it is error to disregard one of these statements as surplusage, and to sustain the pleading on the other, if the averments do not show which is unnecessary. Such uncertainty is a defect not warranted by the Code.)

Buell vs. Cory, 50 *Cal.*, 639. (Complaint alleging that defendant wrongfully and fraudulently took plaintiff's goods; that he then agreed to buy them at what they were reasonably worth; and afterwards refused to negotiate, and by force and threats prevented the plaintiff from removing them. Demurrer on the ground that it did not state facts sufficient to constitute a cause of action, and that it was ambiguous, unintelligible, and uncertain, sustained, because it was impossible to define the character of the intended action.)

F. *Demurrer to Relief.*

§ 120. *General rule.*—Under the New Procedure a demurrer does not lie to the demand of relief.

Where the facts alleged entitle the plaintiff, as against the demurrant, to judgment for any part of the relief demanded by the complaint, a demurrer for insufficiency must be overruled although the relief so asked be more¹ or less² than the plaintiff is entitled to.

It is the better opinion that if the facts alleged entitle plaintiff to no part of the relief demanded, a demurrer for insufficiency should be sustained, even though upon the facts stated plaintiff would be entitled to some different relief.³

¹ *Beale vs. Hayes*, 5 *Sandf.*, 640; s. c., 10 *N. Y. Leg. Ob.*, 166. (Complaint on contract naming penalty with demand of judgment on it as if liquidated damages, not demurrable.)

s. p., at common law. *Pevey vs. Sleight*, 1 *Wend.*, 518. (Declaration at common law on bond in penalty of ten dollars demanding judgment against surety for damages \$90, not demurrable, but the question is for the assessment of damages.)

Hammonds vs. Cockle, 5 *N. Y. Supm. Ct. (T. & C.)*, 56; s. c., 2 *Hun*, 495. (Complaint asking cancellation of deed, partnership, and dower.)

Loveland vs. Garner (*Cal.*, 1887), 12 *Pac. Rep.*, 616. (Under a statute imposing a single penalty for any number of violations, a complaint alleging several distinct violations and claiming a penalty for each is not demurrable for not stating a cause of action nor for misjoinder.)

s. p., *Mercantile Trust & Deposit Co. vs. Rhode Island Hospital Trust Co.*, 36 *Fed. Rep.*, 863. (Demurrer to bill for lack of equity cannot be sustained where complainants may be entitled to a part of the relief prayed for, though not to the whole.)

See also *Scheibe vs. Kennedy*, 64 *Wis.*, 564.

² *Buess vs. Koch*, 10 *Hun* (*N. Y.*), 299; s. c., 53 *How. Pr.*, 92; aff'g 52 *id.*, 478.

³ [The reason is that overruling a demurrer merely amounts to directing judgment as on failure to answer; and if

no relief such as plaintiff is entitled to is specifically demanded in the complaint, another provision of the Code forbids the Court from granting judgment on failure to answer; so that overruling the demurrer would be an empty form, for it would be error to enter judgment thereon. The rule rests upon the fundamental principle that the demand of relief partakes of the nature both of a notice to defendant and of an allegation of a conclusion of law. If defendant does not appear, plaintiff is concluded by his demand of relief, and cannot take any relief by default which he has not asked for. But if defendant answers, the demand of relief is to be treated only as a conclusion of law.]

Edson vs. Girvan, 29 *Hun* (N. Y.), 422. (A complaint stating facts entitling plaintiff to an accounting, is bad on demurrer if it only demands judgment for a specific sum which the facts show plaintiff is not entitled to.)

Followed in **Fischer vs. Charter Oak Life Ins. Co.**, 52 *N. Y. Super. Ct.*, 179; aff'g 14 *Abb. N. C.*, 32; s. c., 67 *How. Pr.*, 191.

Swart vs. Boughton, 35 *Hun* (N. Y.), 281; s. c., 20 *Weekly Dig.*, 427. (Action to cancel deeds on equitable grounds not sustainable on demurrer merely because it stated facts which would entitle plaintiff to recover in ejectment, such recovery not being demanded. After reviewing the cases, the Court say (HAIGHT, J.): "It thus appears to us that where all of the allegations of the complaint are made for the purpose of procuring equitable relief, and where equitable relief alone is asked for, the complaint cannot be sustained for legal redress where no answer has been interposed."

Alexander vs. Katte, 10 *Daly* (N. Y.), 506; s. c., 10 *Abb. N. C.*, 449; 63 *How. Pr.*, 262. (Complaint by receiver to adjudge defendants' transactions with the corporation void, and to require the defendant to produce their notes which they had procured to be surrendered, together with the collaterals which had been held therewith, and asking judgment against the defendants on the notes,—held the right to equitable relief failing, plaintiff could not sustain the action against demurrer on the ground that the facts showed he was entitled to judgment on the notes. DALY, J., says: "The complaint is an application for equitable relief, and as the defendant does not answer, but demurs, the judgment granted could not be more favorable than that demanded in the complaint, even though averments that would be proper in setting forth a legal cause of action are embodied in the pleading;" citing *Kelly vs. Downing*, 42 *N. Y.*, 71.)

Willis vs. Fairchild, 51 *N. Y. Super. Ct. (J. & S.)*, 405, 412. (Complaint to adjudge foreclosure void and give plaintiff leave to redeem, demurrable because it did not make a case for the only relief to which plaintiff was entitled on the facts alleged,—namely, setting aside the sale specifically.)

s. P., Douglass vs. Winslow, 52 *Super. Ct. (J. & S.)*, 439.

Culbertson vs. Munson (*Ind.*, 1886), 4 *North East. Rep.*, 57. (A cross-complaint to quiet title, with alternative prayer for a judgment establishing a lien if title were not made out.)

Compare Mackey vs. Auer, 8 *Hun (N. Y.)*, 180. (Complaint alleging partnership, dissolution, accounting, and a sum found due, for which judgment was demanded; but promise to pay was not alleged. *Held*, not demurrable, for the facts stated entitled plaintiff to ask judgment that the accounting be adjudicated final, and defendant decreed to pay that sum. [This case, it will be seen, is consistent with the principle stated in the text.] But the opinion lays down the rule that defendant “must demur to the facts alleged; and, to sustain his demurrer, he must show that upon those facts the plaintiff cannot have any relief at the hands of the Court; and it is not sufficient for him to show that the relief upon such facts could not be that asked for by the complaint.”)

Kingsland vs. Stokes, 25 *Hun (N. Y.)*, 107. (Foreclosure of mortgage executed by defendant as executor, joining a third person under the usual allegation that he had or claimed some interest, etc.; with prayer for judgment for deficiency against the latter. *Held*, not error to overrule demurrer. The Court say: “The demurrer to the prayer for relief cannot be maintained. [*Citing Mackey vs. Auer*, 8 *Hun*, 180.] If the facts alleged are sufficient to afford any relief, the relief must be in harmony with the facts alleged.”)

Hale vs. Omaha Natl. Bk., 49 *N. Y.*, 626, cited under next section.

Pierson vs. McCurdy, 61 *How. Pr. (N. Y.)*, 134. (LAWRENCE, J., at Special Term, says that a demurrer for insufficiency is not sustainable unless “no cause of action whatever is stated. And the fact that the plaintiff may in his complaint have demanded relief to which he is not entitled, or may have misconceived the nature of the judgment which the Court should pronounce upon the facts set forth in his complaint, does not make the complaint bad upon demurrer, if those facts entitle him to any judgment or any relief.”)

[The facts are not stated sufficiently to make this case an authority on the question.]

Thomas vs. Farley Mfg. Co., 76 *Iowa*, 735; 39 *N. W.*, 874. (Action to enjoin attachment, on facts showing right to possession. Demurrer overruled. REED, J., says: "Under a general prayer the party may be awarded any remedy afforded by the law for the particular injury or wrong complained of.")

§ 121. *Relief against demurrant*.—If the facts show that plaintiff is entitled to judgment against the demurrant for any part of the relief demanded, the complaint is sufficient on demurrer.

All authorities agree on this; see cases under last section.

§ 122. — *against co-defendant*.—If the plaintiff is entitled to relief demanded as against some defendant, and the demurring defendant is a proper party to the action for the purpose of determining it against such other defendant, the fact that plaintiff is not entitled to the only specific relief he has demanded against the demurrant personally will not sustain the demurrer.

Lord vs. Vreeland, 13 *Abb. Pr. (N. Y.)*, 195; aff'd in 15 *id.*, 122; s. c., 24 *How. Pr.*, 316. (Holding an action against defendant, as executor, not demurrable because it also demanded damages against him in his individual capacity.)

s. p., Haines vs. Hollister, 64 *N. Y.*, 1. (Action against assignee for benefit of creditors of an insolvent firm, joining the representatives of a deceased partner, and the surviving partners: demurrer by the surviving partners on the ground that the only specific relief asked against them was an unfounded claim for balance remaining unpaid,—not sustainable because they were proper parties anyway.)

§ 123. *Alternative relief*.—To sustain a bill in equity for alternative relief the prayer must be in the alternative. If after the first prayer, for specific relief, the other prayer, whether general¹ or specific,² is stated con-

junctively as for additional relief, instead of disjunctively as for alternative relief, a demurrer lies.

¹ *Colton vs. Ross*, 2 *Paige* (N. Y.), 396.

² *Lloyd vs. Brewster*, 4 *id.*, 537.

Alternative relief now expressly provided for in Conn.
Trowbridge vs. True, 52 *Conn.*, 190.

5. OBJECTION THAT THE ACTION IS PREMATURE, OR THAT A DEFENCE IS DISCLOSED.

§ 124. Prematurity ; not presumed.

125. — Violation of positive prohibition.

§ 126. — Enough that any relief is due at time of argument.

127. Disclosure of defence.

128. — with avoidance.

§ 124. *Prematurity not presumed.*—Under the New Procedure, a complaint,¹ or amended complaint,² which shows that the cause of action had not accrued at the time when the action was first commenced, is demurrable on the ground that it does not state facts sufficient to constitute a cause of action.

But this rule does not apply to a complaint which shows a cause of action, and merely fails to show the relative time of its complete accrual, and that of the commencement of the action,³ unless it affirmatively appears on the face of the complaint that the action was brought before the time when it should have been brought,⁴ or unless a provision of statute or of the contract in suit forbids the action until after the time or event in question.⁵

But it is not always essential that the amount of recovery should be ascertainable upon facts which occurred before suit brought.⁶

¹ *Hare vs. Van Deusen*, 32 *Barb.* (N. Y.), 92. (Action to establish and foreclose vendor's lien, arising on exchange

of property, and alleged breach of covenant against encumbrances in regard to the property taken in exchange. *Held*, that no sale for such encumbrances having been alleged, the action was premature, and the complaint demurrable.)

s. P., *Millett vs. Hayford*, 1 *Wis.*, 401.

Smadbeck vs. Sisson, 31 *Hun* (*N. Y.*), 582 ; s. c., 4 *Civ. Pro. R.*, 353 ; 66 *How. Pr.*, 225 ; aff'g *id.*, 220. (Action for services alleged to have been performed during a period extending "down to the commencement of this action." *Held*, on motion to vacate attachment, that the complaint did not show a cause of action.)

Reilly vs. Sisson, 31 *Hun* (*N. Y.*), 572. (Action for money lent and advanced at sundry times, "up to and including this date" [the day of applying for attachment]. *Held*, on motion to vacate the attachment, that the complaint did not show a cause of action.)

Moore vs. State Ins. Co., 72 *Iowa*, 414 ; 17 *Ins. L. J.*, 150 ; 34 *North West.*, 183. (Action on a policy of insurance, the policy made a part of the petition, and containing a condition that an action should not be maintained thereon unless brought within a stated time after the loss. It appeared from the statements of the petition and from the date of the filing thereof that the action was not begun within such time. *Held*, bad on demurrer for insufficiency.)

² *Richards vs. Brice*, 13 *N. Y. State Rep.*, 728.

³ Otherwise at common law where the date of the commencement of the action appears by the date of the writ. *Hotchkiss vs. Judd*, 94 *Mass.* (12 *Allen*), 447.

In equity, the filing of the bill being the commencement of the action, the allegations sufficiently show the existence of the facts alleged before the commencement.

Under the New Procedure the service of the summons is the time of the commencement for this purpose in personal actions, unless, perhaps, where it appears that a provisional remedy had been previously granted. *N. Y. Code Civ. Pro.*, § 416.

Delivering the summons to the sheriff for the purpose of service does not make the action premature if no other step is taken in the suit.

⁴ *Maynard vs. Talcott*, 11 *Barb.* (*N. Y.*), 569. (Overruling demurrer, and holding that the Court must presume that the action is not premature unless the contrary appears.)

s. P., *Grimes vs. Hagood*, 19 *Tex.*, 246. (The fact that the action was premature cannot be shown in support of a demurrer, by the proof of service of summons, for

that is no proper part of the record on demurrer. *Smith vs. Holmes*, 19 *N. Y.*, 271.)

s. p., *Dalrymple vs. City of Milwaukee*, 53 *Wisc.*, 178; s. c., 10 *North West. Rep.*, 141. (LYON, J., says: "While, on demurrer, the Court will not look beyond the complaint to ascertain when the action was commenced [citing *Smith vs. Janesville*, 9 *North West. Rep.*, 789; *Zagel vs. Kuster*, 51 *Wisc.*, 31], because the demurrer is aimed at the complaint alone, no good reason is perceived why, on a motion to grant or dissolve an injunction, which goes to the equity of the case, the Court should not consider the whole record for the purpose of ascertaining the real equities of the parties.")

And in *Beard vs. Porter*, 124 *U. S.*, 437; s. c., 31 *Law ed.*, 492, it was held that as the statute requiring actions against the collector for excess of duties exacted, to be brought within the time limited, provides for a bill of particulars, and as the date might appear in a bill of particulars not in the record on demurrer, if the fact was alleged in the declaration, it must be assumed on demurrer that it occurred within the statutory time.

⁵ See cases in note 1, and next section.

⁶ *Peck vs. Vandemark*, 99 *N. Y.*, 29, 35 (and note in 18 *Abb. N. C.*, 158); aff'g 33 *Hun*, 214. (Holding that on a marriage contract to give the widow a share of husband's estate an action was not premature because brought to trial before debts and expenses of administration had been ascertained.)

§ 125. — *Violation of positive prohibition.*—If a public statute,¹ or a provision of the contract sued on, which provision appears in the complaint,² forbids an action to be commenced until a specified period has elapsed or after a specified period has elapsed, the objection that the complaint does not show the necessary time is available under a demurrer on the ground that it does not state facts necessary to constitute a cause of action.

¹ *Selover vs. Coe*, 63 *N. Y.*, 438. (Action against heir under statute requiring three years to elapse before suit can be brought.)

[For other cases see § 146, and *Leave to sue*, etc., below. The statute of limitations is an exception in many jurisdictions to this rule, because expressly required to be pleaded by answer.]

² *Carberry vs. German Ins. Co.*, 51 *Wisc.*, 605; s. c., 11 *Rept.*, 720.

§ 126. — *Enough that any relief is due at time of argument.*—Where the complaint does not state the time when the action was commenced, it is not demurrable for insufficiency as being premature, if it shows a right to any relief at and before the time of the trial of the demurrer.

Smith vs. Holmes, 19 *N. Y.*, 271. (Action on a bond, sustained because the first instalment of interest was due before demurrer was tried, and perhaps was due before suit commenced.)

Lewis vs. City of Buffalo, 1 *Buff. Super. Ct. (Sheldon)*, 80; s. c., 29 *How. Pr.*, 335. (Holding that even where the law applicable to a case has been altered by the legislature pending the action, the Court will dispose of issues of law arising on demurrer, according to the law at time of trial of the issues, if it does not appear on the face of the complaint when the action was commenced.)

§ 127. *Disclosure of defence.*—A demurrer to a cause of action containing allegations constituting a defence will be sustained, although such allegations were unnecessary and without them the alleged cause of action would be made out.

Compton vs. Hughes, 38 *Hun (N. Y.)*, 377, 380. (Former adjudication disclosed,—fatal.)

N. & W. R. R. Co. vs. Wysor, 82 *Va.*, 250; s. c., 10 *Va. L. J.*, 598. (Declaration on carrier's special contract,—*held* bad on demurrer because it showed a breach of conditions on plaintiff's own part.)

Calvo vs. Davies, 73 *N. Y.*, 211. (A complaint to foreclose a mortgage, in addition to the stating of facts constituting a cause of action, also alleged the making of an agreement between the mortgagee and subsequent purchaser which had the legal effect of discharging the mortgagor. On demurrer by the latter, *held*, that the averment of the agreement should not be rejected, leaving it for the defendant to bring it to the notice of the Court by answer, but the whole complaint should

be considered in determining whether it states a cause of action, both the allegations that discharge as well as those that tend to charge the defendant.

[For other illustrations see below, ILLEGALITY, LACHES, LIMITATIONS, etc. In some jurisdictions the statute of limitations is an exception to the above rule.]

§ 128.—*with avoidance*.—In equity, and under the New Procedure, a complaint is not demurrable because it discloses a defence, if it alleges, even hypothetically or contingently upon such defence being interposed, facts which amount to a sufficient avoidance of that defence.

By the U. S. Rules in Eq. No. 21, "the plaintiff may, in the stating or narrative part of his bill, state, and avoid by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defence or excuse to the case made by the plaintiff for relief."

In equity, an anticipated defence may be stated "as a pretence," in the charging part of the bill, and avoided, without admitting it. *Puterbaugh's Mich. Chan.*, 2d ed., 28.

After special replications in equity were disused, it was necessary to plead avoidance of a defence, by amending the bill; and the same practice was adopted under the Code, by giving leave to amend the complaint.

Hence arose the practice in equity of inserting such allegations by anticipation, a practice sanctioned by the rule above stated; and the corresponding practice under the Code, sanctioned by such cases as *Chapman vs. Webb*, 6 *How. Pr. (N. Y.)*, 390; *Hollister vs. Livingston*, 9 *id.*, 140; *Thompson vs. Minford*, 11 *id.*, 273; s. p., *Everitt vs. Conklin*, 90 *N. Y.*, 645, quoted under § 99; *Winsted Bank vs. Webb*, 39 *N. Y.*, 325, aff'g 46 *Barb.*, 177.

6. PARTICULAR SUBJECTS OF ALLEGATION. (Alphabetically arranged.)

[Further illustration of these rules, and other rules which may often be invoked on demurrer, will be found in the later divisions of this work: see APPLICATIONS ON

THE PLEADINGS; DEFINING THE ISSUE; RECEPTION OF EVIDENCE; and SUBMISSION AND INSTRUCTIONS.]

[Rules as to what is a conclusion of law are to be taken with the qualification that this question often depends on whether the matter is directly or collaterally involved.*

ABBREVIATIONS, § 129.

ACCEPTANCE, § 130.

ACCOUNT, §§ 131-133.

ADVERSE CLAIM, §§ 134, 135.

AGENCY, §§ 136, 137.

ALTERNATIVE CHARGES, § 138.

AMOUNT, § 139.

APPEARANCE, § 140.

ASSIGNMENT, §§ 141-145.

AUDIT, §§ 146, 147.

AUTHORITY, §§ 148-150.

BILL OF PARTICULARS, § 151.

BONA FIDE PURCHASER, § 152.

BY-LAWS, § 153.

CAUSE AND EFFECT, § 154.

COLLUSION, § 155.

COMPULSION, § 156.

CONCEALMENT, § 157.

CONFEDERACY, § 158.

CONSENT, § 159.

CONSPIRACY, § 160.

CONTRACTS, §§ 161-201.

CORPORATIONS, §§ 203-207.

DAMAGES, §§ 208-212.

DATE, §§ 213-217.

DELAY, § 218.

DELIVERY, § 219.

DEMAND, §§ 220-223.

DESCENT, § 224.

DETENTION, § 225.

DISCLAIMER, § 225a.

DOCUMENTS, §§ 226-254.

"DULY," § 255.

DUTY, § 256.

EASEMENT, § 257.

ELECTION, § 258.

FOREIGN LAW, §§ 259, 260.

FORMER RECOVERY, § 261.

FRAUD, §§ 262-265.

HEIR, § 266.

ILLEGALITY, §§ 267-271.

INABILITY, § 272.

INDEBTEDNESS, § 273.

INSANITY, § 274.

INSOLVENCY, § 275.

INTENT, § 276.

JUDGMENTS, §§ 277-285.

LACHES, § 286.

LEAVE TO SUE, §§ 287, 288.

LIABILITY, § 289.

LIEN, § 290.

LIMITATIONS, § 291.

MAINTAINING, § 292.

MARRIED WOMEN, § 293.

MISNOMER, § 294.

MISTAKE, §§ 295, 295a.

NAME, §§ 296-302.

NECESSITY, § 303.

NEGLIGENCE, §§ 304-308.

NON-PAYMENT, § 309.

NOTICE, §§ 310-316.

NUISANCE, § 317.

OFFER, §§ 318, 319.

ORDINANCES, § 320.

* Text writers have sought to define what is a conclusion of law, by analysis of the conception itself; but in practice it is necessary to notice also that a proposition may be for one purpose a conclusion of fact good on demurrer, and for another a conclusion of law bad on demurrer. Thus if I sue for goods sold, a mere allegation of indebtedness is a conclusion of law; if, after getting judgment, I sue to set aside a fraudulent conveyance, an allegation of the indebtedness as the foundation of the judgment is a matter of fact. To take a still more striking illustration: if I merely allege that A and B were partners, this is good as an allegation of fact; but if I set forth a contract between them and allege that they were partners under it, this is a conclusion of law.

The best discussion of the philosophic distinction between "law" and "fact" is in Prof. THAYER's art. in 4 *Harv. Law Rev*, 147, Nov. 1890.

OWNERSHIP, §§ 321-327.

PARTNERSHIP, § 328.

PAYMENT, § 329.

PERMISSION, § 330.

RATIFICATION, § 331.

REASONABLE TIME, §§ 332-334.

REGULARITY, § 335.

REPUGNANT ALLEGATIONS, § 336.

RULES OF COURT, § 337.

SEIZIN, § 338.

SERVICE, § 339.

STATUTES, §§ 340-351.

SUCCESSION, § 352.

TENDER, § 353.

THEREUPON, § 354.

TIME, § 355.

TITLE, §§ 356-359.

TORTS, §§ 360-363.

TRUSTEES, § 364.

USAGE, §§ 365, 366.

WILL, § 367.

ABBREVIATIONS. [See also ALLEGATIONS and DOCUMENTS, below.]

§ 129. *General rule.*—Under the general rule that pleadings must be in the English language, in fair, legible character, and in words at length and not abbreviated, except by such abbreviations and numerals as are in common use,¹ a pleading is not made demurrable by using an abbreviation, if it be such as is in common use in the English language, even though the phrase for which the abbreviation originally stood be Latin.²

¹ The general rule is thus codified in *N. Y. Code Civ. Pro.*, § 22: "Each . . . pleading or other proceeding in a court, or before an officer, must be in the English language, and, unless it is oral, made out on paper or parchment, in a fair, legible character, in words at length, and not abbreviated. But the proper and known names of process, and technical words, may be expressed in appropriate language, as now is, and heretofore has been, customary; such abbreviations as are now commonly employed in the English language may be used; and numbers may be expressed by Arabic figures or Roman numerals in the customary manner" *Rice vs. Buchanan*, *Hamilton Superior Court, Ohio*, 1844, 1 *W. L. J.*, 395. (Not error to abbreviate thus in declaration, "damages one thous. dollars," though the practice is not to be commended.)

In *Odd Fellows Building Assoc. vs. Hogan*, 28 *Ark.*, 261 (mechanic's lien: sheriff's return of service made of within writ on "Peter Brugman, President O. F. B. A." He was described in the writ as president of the Odd Fellows Building Association), BENNETT, J., said:

“While we are willing to admit that abbreviations should be very sparingly employed, if at all, in formal and imported legal documents, yet they are of frequent use, and if by using the initial letters of words, instead of the words at length, the same meaning is conveyed, it would not be considered as so informal as to make the abbreviation of no significance. If the abbreviation, taken in connection with the remainder of the writing and subject-matter, can be clearly understood and not be ambiguous, it must have the same effect as if the words were written in full.”

^a *Berry vs. Osborn*, 28 *N. H.*, 279. (The abbreviation “&c.” is English, and will not render a plea demurrable on the ground that it is expressive of Latin words.)

Bryan vs. Bates, 15 *Ill.*, 87. (Action for assault and battery and imprisoning. Objection was taken to the pleas that they did not answer the whole declaration, for that a battery was alleged and not answered. The introductory allegation was “as to the assaulting, &c., the said plaintiff, and imprisoning.” *Held*, that this was broad enough. “The beating is included in the ‘&c.’ well enough without setting it out at length.”)

[Under the Code Practice such an answer might be open to the objection of being evasive.]

Smith vs. Butler, 25 *N. H.*, 521. (Demurrer to plea in abatement. The abbreviation *vs.* stands for *versus*. And *vs.* and *versus* from long use have been grafted on the English language, and are as appropriate as the word *against* in legal proceedings.)

Whether the letters L. S. suffice, as a copy of a seal in the copying or enrolling of a legal precept, see § 165.

ACCEPTANCE. [For acceptance of delivery see CONTRACT and DELIVERY, below.]

§ 130. *Acceptance of bill implies writing.*—An allegation that a person accepted a bill of exchange is sufficient on demurrer as implying that he accepted it in writing; for under the statute there can be no valid acceptance except in writing.

Bank of Lowville vs. Edwards, 11 *How. Pr. (N. Y.)*, 216.
Graham vs. Machado, 6 *Duer (N. Y.)*, 514. (In an action by the indorsees of a bill of exchange against the drawer, an allegation of acceptance implies that the

drawee accepted; that the bill was before him for that purpose; and that he had sight thereof. Demurrer sustained on other grounds.)

ACCOUNT. [For Allegations sufficient to claim accounting in equity, see §§ 105-109, above.]

§ 131. General form of pleading indebtedness on account. § 133. Account or particulars coupled with pleading.

132. "Justly due."

§ 131. *General form of pleading indebtedness on account.*—A complaint which alleges in effect that defendant is indebted to plaintiff in a specified sum upon an account,—as, for instance, for goods sold and delivered by plaintiff to defendant, at a time and place specified,¹—or upon an account for services of a specified nature rendered by plaintiff to defendant, up to a date named,²—or for use and occupation of specified premises, etc., etc.,³ and that there is now due a specified sum for which judgment is demanded,—though very general in form, is sufficient on demurrer.

¹ *Allen vs. Patterson*, 7 N. Y., 476; s. c., 57 Am. Dec., 542. s. P., *Wise vs. Hogan*, 77 Cal., 184; s. c., 19 Pacif. Rep., 278. (So held even though defendant was sued as an administrator. His remedy is to demand a copy of the account.)

[For the rule where no account is mentioned, see INDEBTEDNESS, below.]

² *Beekman vs. Platner*, 15 Barb., 550.

³ *Ketcham vs. Barbour*, 102 Ind., 576; s. c., 3 West. Rep., 855. (Holding that a complaint upon an itemized account wherein it is alleged that the defendant "is indebted" to the plaintiff in a specified sum of money "for the rent, use and occupation of" a certain land belonging to his decedent, shows a present mature indebtedness, and is sufficient to withstand a demurrer for the want of facts. [Citing *Mayes vs. Goldsmith*, 58 Ind., 94; *Heshion vs. Julian*, 82 Ind., 576.]

[In all the above cases the complaint referred to an account. The decisions have not been regarded as holding that a bare allegation of indebtedness for specified

considerations, in a complaint which is not thus founded on an account, is sufficient against a motion to make more definite and certain.]

In *Wills vs. Churchill*, 78 *Me.*, 285 ; s. c., 4 *Atl. Rep.*, 693, it was held that such a complaint referring to an account annexed was good even against special demurrer, at common law. FOSTER, J., said : " Admitting that every item to which objection has been raised may be the subject of a distinct contract, yet each one is alleged with sufficient particularity to admit proof in support of the same. Every item is a bill of particulars. The office of a declaration is to make known to the opposite party and the Court the claim set up by the plaintiff. To such claims the defendant is called to answer, and to no others. But what more specific claim need be alleged than that wherein the plaintiff sets out that on a certain day he performed labor for the defendant, and in the same charge carries out a price which he seeks to recover for that labor ; or that he paid, on a particular day, a specified sum for freight, for which he also seeks a recovery ? For the legal meaning of the charge may be read along with it. [Citing *Cape Elizabeth vs. Lombard*, 70 *Me.*, 399.] The objection that the particular kind of labor performed each day is not specified in addition to the general term 'labor' is not tenable."

§ 132. "*Justly due.*"—Under a statute or rule of Court allowing a short form of pleading on an account, by alleging that the sum thereon is justly due, an allegation of the sum claimed, without saying it is justly due, is bad on demurrer.

Schafer vs. Brotherhood of Carpenters, 22 *W. N. C.*, 312.

§ 133. *Account or particulars coupled with pleading.*—Where an account or statement of particulars filed or served is effectually made a part of the pleading,—as where it is expressly required by statute as a part of the pleading,¹—the pleading is to be treated on demurrer as if the particulars appearing in the account, etc., had been actually incorporated in the pleading.² Otherwise of a bill of particulars served as at common law.³

¹ As to statutes in several of the States, see DOCUMENTS, below.

² *Wright vs. Smith*, 81 *Va.*, 777; s. c., *Va. L. J.*, 415 (citing *Starkweather vs. Kittle*, 17 *Wend.*, 20.)

Wills vs. Churchill 78 *Me.*, 285; s. c., 4 *Atl.*, 693.

³ See BILL OF PARTICULARS, below.

ADVERSE CLAIM.

§ 134. Formal allegation not essential. § 135. Insufficient if facts alleged show validity.

§ 134. *Formal allegation not essential.*—Allegations setting forth the respective claims of the parties sufficiently to show that the claims are in hostility to each other, are sufficient, without adding a formal allegation that defendant's claim is adverse to the plaintiff's.

Kitts vs. Willson, 106 *Ind.*, 147; s. c., 5 *North Eastern Rep.*, 400. (Cross complaint. [Citing *Second Nat'l Bk. vs. Corey*, 94 *Ind.*, 457.])

s. p., *Linden vs. Doetsch*, 40 *Hun (N. Y.)*, 239. (Holding that in the action of an heir to have a widow's conceded dower set off, an allegation that she claims the dower is not necessary.)

§ 135. *Insufficient if facts alleged show validity.*—In those classes of cases where a general allegation of an adverse claim in the complaint is sufficient to put upon the defendant the burden of pleading and proving a sufficient claim, if beside or instead of such general allegation the plaintiff sets forth the facts on which it is based, and they are in law sufficient to substantiate the claim, the complaint is demurrable.

People ex rel. Caton vs. Ottawa Hydraulic Co., 115 *Ill.*, 281; s. c., 3 *North East. Rep.*, 413, 416. (Quo warranto.)
McPheeters vs. Wright (*Ind.*, 1887), 8 *West. Rep.*, 514. (Action to quiet title.)

AGENCY. [See also CAPACITY; AUTHORITY; CONFEDERACY; CONSPIRACY; CONTRACT; DOCUMENT; RATIFICATION.]

§ 136. Agency an allegation of fact.

§ 137. Act by agent alleged as that of principal.

§ 136. *Agency an allegation of fact.*—A direct allegation that one person was the agent of another, if it states that he acted as such in the transaction in question, is not a mere conclusion of law, but a sufficient allegation of fact.¹

The word “agent” is not essential. An allegation of the existence of a relation or other circumstances legally constituting an agency sufficient to include the transaction in question is enough;² but an allegation of circumstances merely tending to show agency or employment is not enough.³

But where a contract is not alleged to have been made by the defendant but by a third person, a mere allegation that the latter acted for the defendant is not enough, for it may mean an assumed as well as a real agency.⁴

¹ *Spelman vs. Fisher Iron Co.*, 56 *Barb.*, 151. (Allegations, that a person named was the managing agent and a superintendent of the company who were the plaintiff's employers; that the powder, the bad quality of which caused the injury, was furnished by the company through him to the plaintiff, who assured the plaintiff that it could be employed with safety,—*held*, equivalent to a direct and simple averment that the defendant furnished the powder to the plaintiff.)

² *Bank of the Metropolis vs. Guttschlick*, 14 *Pet.*, 19; s. c., 10 *Law. ed.*, 335. (Allegation that an agreement made by a bank “with the president and cashier” sufficiently implies their authority.)

McMillan vs. Saratoga & Washington R. R. Co., 20 *Barb.*, 449. (Allegation that while defendants were running their railroad, plaintiff's intestate was in the employ of defendants as an engineer upon their locomotive, while it was in their use and service, *held*, sufficient to show the relation of master and servant; but that

no special contract was to be inferred from such allegation.)

Anderson vs. N. J. Steamboat Co., 7 *Robt.*, 611. (Action for negligence sustained on defendant's boat. *Held*, that an allegation that a person named "was employed on said boat" sufficiently imported that he was employed by defendant.)

* *Blackwell vs. Wiswall*, 24 *Barb.*, 355; s. c., 14 *How. Pr.*, 257. (*Dictum*, in an action against a defendant alleged to be running a skiff-ferry, by his lessee, that an allegation that the injury occurred by the negligence "of the man rowing and having charge of the skiff" run at defendant's ferry, would not be a sufficient allegation that the man was in defendant's employ, had it not been conceded by counsel on the argument.)

[*Contra*. A mere allegation of agency is held not enough to charge one person with a contract alleged to have been made by another, if there is nothing to show that the contract was within the scope of the agency. *May vs. Kelly*, 27 *Ala.*, 497.]

[So an allegation that one acting for himself and as joint owner of a boat, contracted, is not enough to charge the other joint owner, where joint ownership does not imply authority, *Brooks vs. Harris*, 12 *Ala.*, 555.]

* *Childress vs. Miller*, 4 *Ala.*, 447, 450.

s. p., *Brown vs. Commercial Fire Ins. Co.*, 86 *Ala.*, 189; s. c., 5 *So. Rep.*, 500. (Allegation, in action on policy, that transactions were had through one K., an insurance agent.)

Codding vs. Mansfield, 73 *Mass.* (7 *Gray*), 272. (An allegation that the selectmen offered the reward sued for, without even stating that they did so in behalf of the town, is not enough to charge the town.)

§ 137. *Act by agent alleged as that of principal*.—An allegation that a party did an act, without alleging anything concerning agency, is sufficient, although the circumstances show that the act could not have been done except through an agent,¹ as for instance where the party was a corporation.

But an allegation that an act was done through an agent is not improper.²

A contract or other act on the part of a corporation is properly alleged in pleading as having been made or

done by the corporation itself without alluding to the agency of officers or employees. *Buffalo Lubricating Oil Co. vs. Standard Oil Co.*, 43 *Hun* (N. Y.), 153, 158. BARKER, J., well states the rule as follows: "The plaintiff in stating his cause against a corporation may and should state the acts complained of as being the acts of the corporation itself, and it is not necessary nor proper to aver in the complaint that they were done by and through the authorized agent of the corporation. It is a matter of proof upon the trial to establish that the person who did the act was the authorized agent of the defendant, for it can only act through its officers and agents. When a charge is made in a pleading against a corporation by its corporate name, the legal inference is that some person or persons in its employ did the act imputed." [Citing 1 *Chitty on Plead.*, 286; 2 *Wait's Pr.*, 376; *Stoddard vs. Onondaga Conference*, 12 *Barb.*, 575.]

[This decision was affirmed in 106 *N. Y.*, 669, without noticing this point.]

s. P., *Edison Electric Light Co. vs. United States Electric Lighting Co.*, 35 *Fed. Rep.*, 134. (Plea of foreign patent sufficient, because application might have been made by some one for the inventor: it is not necessary to allege that an instrument was executed by an agent, and that the agent was duly authorized thereto; it is sufficient to allege its execution by the principal.)

s. P., *Bank of the Metropolis vs. Guttschlick*, 14 *Pet.*, 19; s. c., 10 *Law. ed.*, 335.

Hoosac Min. & Mill. Co. vs. Donat, 10 *Colo.*, 529; s. c., 16 *Pacific Rep.*, 157.

Illinois Centr. R. Co. vs. Latimer 128 *Ill.*, 163; s. c., 21 *North East.*, 7. (Holding that a count charging trespass by a corporation may be joined with one alleging that the corporation by an agent committed it.)

Weide vs. Porter, 22 *Minn.*, 429; *St. Andrew's Bay Land Co. vs. Mitchell*, 4 *Fla.*, 192; *Burnham vs. Milwaukee*, 69 *Wisc.*, 379; s. c., 34 *North West. Rep.*, 389.

But he who pleads the act of a corporation without stating through whom it was done, may, if fairness requires, be ordered to make the complaint more specific by designating the officer or agent. *Webster vs. Continental Ins. Co.* 67 *Iowa*, 393; s. c., 25 *North West. Rep.*, 675. (Reversing for refusal to require such correction.)

Especially if he unnecessarily alleges that it was done by agent. *Schellens vs. Equitable Life Asso.*, 32 *Hun*, 235.

Contra, Todd vs. Minneapolis & St. L. R. Co., 37 *Minn.*, 358; s. c., 35 *North West. Rep.*, 5.

In Connecticut a rule of court requires that an act (other than that of a corporation), if done by agent, must be so alleged if known to the pleader. *Santo vs. Maynard* 57 *Conn.*, 157; s. c., 17 *Atl. Rep.*, 701.

² *St. John vs. Griffith*, 1 *Abb. Pr.*, 39. (Denying motion to strike out allegation of agency.)

[The case of *Dollner vs. Gibson*, 3 *Code R.*, 153; s. c., 9 *Leg. Obs.*, 77, holding that an allegation of agency might be struck out as irrelevant, was reversed on appeal.]

ALTERNATIVE CHARGES.

§ 138. *Embarrassing ambiguity*.—An allegation in the alternative which is so ambiguous that the complaint fails to indicate what is the ground or cause of action renders the complaint insufficient on demurrer.

[Compare §§ 89, 99, 119.

Corbin vs. George, 2 *Abb. Pr.*, 465. (Allegation that A represented that B had a perpetual lease, *or* a deed, *or* a contract or writing for a deed or lease, from C *or* D *or* the owner of the fee (being understood to mean, not that he made an alternative representation, but to allege in the alternative that he made one representation *or* the other], *held* “alternative pleading which never was good under any system of practice.” *So held* on motion to make more definite.)

Brooks vs. O'Hara, 8 *Fed. Rep.*, 529; s. c., 2 *McCrary*, 644; 27 *Int. Rev. Rec.*, 336; 12 *Reporter*, 353. (A bill to set aside a decree, which alleges that the decree was obtained *either* by mistake, *or* by deception, *or* by collusion, etc., is demurrable as being too indefinite.

AMOUNT.—[See also DAMAGES.]

§ 139. *Evasive or argumentative allegation*.—Where a specific amount is material but is not directly alleged, as against demurrer, the Court will not spell it out from an evasive or argumentative allegation.

McKinney vs. Snider, 116 *Ind.*, 160; s. c., 18 *N. East*, 526.
(Allegation that property exceeds the amount of exemption, a mere conclusion.)

s. p., Jackson vs. Rowell, 87 *Ala.*, 685; s. c., 4 *L. R. A.*, 637; s. c., 6 *South. Rep.*, 95. (Allegation of value and necessity for sale in partition.)

[For other authorities see DEMURRER FOR WANT OF JURISDICTION.]

[Compare dictum in Seeley vs. Engell, 13 *N. Y.*, 542, to the effect that motion is the remedy.]

APPEARANCE.—[See also “DULY,” below.]

§ 140. *An issuable allegation.*—An allegation that a party appeared in a legal proceeding, or did not appear, is sufficient on demurrer, without stating facts showing that the appearance was practically regular, or that the party was put into default by being duly called.

Thomas vs. Cameron, 17 *Wend.*, 59. COWEN, J., said:

“The calling and default are mere matter of practice; and the practice of the Court is not, in general, the subject of pleading (1 *Chit. Pl.*, 407). The issue in an action on a bail bond is simply ‘did not appear at the day,’ by the plaintiff, and ‘did appear at the day,’ by the defendant. The mode or evidence of appearance or non-appearance, which is known under the practice to be quite artificial, is never mentioned; but only the legal effect, according to a cardinal rule which runs through all pleading. Whether the appearance be practically correct is matter of evidence.”

s. p., Ayres vs. Western R. R. Corp., 45 *N. Y.*, 260. (Allegation of filing petition and bond for removal of cause).

ASSIGNMENT. [See also CONTRACTS, DOCUMENTS, “DULY,” OWNERSHIP, and TITLE, below.]

§ 141. *Mode.*

142. Consideration.

143. Time.

§ 144. *Leave.*

145. Principal and accessory obligation.

§ 141. *Mode.*—Where an oral or an unsealed assignment is valid at common law, an allegation that the thing was assigned without stating that it was assigned by

writing or by a sealed instrument is sufficient on demurrer.

River Falls Bank vs. German Am. Ins. Co., 72 *Wisc.*, 535; s. c., 40 *North West. Rep.*, 506.

[See also "DULY."

A stricter rule applies to the assignee of a lease, suing for rent. *Willard vs. Tillman*, 2 *Hill.*, 274, 1 *Chit. Pl.*, 16 *Am. ed.*, *383.

But one suing the assignee of a lease for rent may allege the assignment generally without pleading the particulars, for they are matters within the defendant's knowledge.

§ 142. *Consideration*.—In an allegation of an assignment of the cause of action sued on, a consideration need not be stated.

Cottle vs. Cole, 20 *Iowa*, 481. (Assignment of judgment.)
Lappin vs. Mumford, 14 *Kans.*, 9. (Administrator's sale of claim at private sale by order of Court.)

Martin vs. Kanouse, 2 *Abb. Pr. (N. Y.)*, 330. (Assignment of judgment.)

s. p., *Sheridan vs. Mayor, etc., of N. Y.*, 68 *N. Y.*, 30. (Assignment of claim for price of services, etc.)

§ 143. *Time*.—In an allegation of an assignment of the cause of action, the time need not be specifically stated; but it is sufficient if it appear that the assignment was made before the commencement of the action, and not before the cause of action assigned accrued.

Silver vs. Henderson, 3 *McLean*, 165. (Allegation that a note was assigned on the day, or at the time, of its execution sufficient.)

Martin vs. Kanouse, 2 *Abb. Pr.*, 330. (Allegation that one was "after" the other sufficient.)

Amendment of a defect in this respect allowable. See *Bamberger vs. Terry*, 103 *U. S.*, 40.

§ 144. *Leave*.—An allegation of an assignment of the cause of action made by an assignee in bankruptcy, or receiver, is sufficient on demurrer, without alleging

a leave of court, at least unless facts showing the necessity of leave appear in the pleadings.

Barnes vs. Matteson, 5 *Barb. (N. Y.)*, 375. (To a plea that the promises sued on had been transferred in bankruptcy to an assignee, replication that they had been purchased from him sufficient, without averring order of Court.)

§ 145. *Principal and accessory obligation*.—An allegation of an assignment of the principal obligation sufficiently imports, on demurrer, the assignment of the collateral security therefor.¹

An allegation of an assignment of a security which shows an indebtedness, there being no other principal obligation, imports an assignment of the indebtedness secured thereby.²

¹ *Thomson vs. Madison Building and Aid Asso.* 103 *Ind.*, 279; s. c., 1 *West. Rep.*, 269.

Kurtz vs. Sponable, 6 *Kans.*, 395.

See also *Abb. Tr. Ev.*, Assgt.

In *Morris vs. Peck*, 73 *Wisc.*, 482; s. c., 43 *North West.*, 623, foreclosure of mortgage securing a non-negotiable promissory note, an allegation of an assignment of "said contract and mortgage and the amount due thereon," held sufficient allegation of assignment of the note and mortgage.)

² *Severance vs. Griffith*, 2 *Lans. (N. Y.)*, 38. (Allegation of an assignment of the mortgage which recited debt, there being no bond.)

s. P., *Caryl vs. Williams*, 7 *id.*, 416.

AUDIT. [See also LEAVE TO SUE and STATUTES.]

§ 146. Necessity of alleging.

§ 147. Time of presentation.

§ 146. *Audit, demand, presentation, or notice, etc., required by statute must be alleged*.—Where a statute forbids actions of a specified class or nature to be brought until after the performance of a condition precedent, such

as audit, demand, or presentation, the complaint is bad on demurrer if it does not show performance of the condition.¹

It is the better opinion that under the New Procedure this rule applies whether the action would lie at common law, or is given by the statute.²

¹ *Ellisen vs. Halleck*, 6 *Cal.*, 386. (Holding demurrer the remedy when the statute forbids the action except after presentation.) [As to what claim is within the statute, this case is questionable.]

McCann vs. Sierra County, 7 *Cal.*, 121; *Alden vs. County of Alameda*, 43 *id.*, 270. (Sustaining demurrer for want of allegation that the claim was presented to board of supervisors.)

Maddox vs. County of Randolph, 65 *Ga.*, 216. (Complaint against county may be dismissed on motion for insufficiency in not alleging presentation for audit which was required by statute.)

Billings First Nat'l Bk. vs. Custer County, 7 *Mont.*, 464; s. c., 17 *Pacif. Rep.*, 551. (Complaint by witness suing county for fees in criminal case bad on demurrer for not alleging judge's certificate, itemized bill, and presentation under oath.)

Fisher vs. Mayor, etc., of N. Y., 67 *N. Y.*, 73. (Application to the mayor for payment before suing on an award of damages for a local improvement.)

Reining vs. City of Buffalo, 102 *N. Y.*, 308, 311. (Here the general principle is fully discussed, and authorities reviewed, in a case where the statute required presentation of claim on municipal corporation.)

Hammele vs. Kramer, 12 *Ohio St.*, 252. (Action against executors or administrators under statute to the effect that no executor or administrator shall be liable to the suit of a creditor until after the expiration of eighteen months from the date of the administration bond, or unless the claim has been exhibited to the executor or administrator and by him rejected.)

Thompson vs. City of Milwaukee, 69 *Wisc.*, 492; s. c., 34 *North West. Rep.*, 402. (Action against city for work and materials in building school-house; statute requiring notice to be filed within twenty days.)

² *Reining vs. City of Buffalo*, 102 *N. Y.*, 308, and other cases above cited.

As to what claims are within the language of such a

statute, and what is a sufficient presentation, see note in 24 *Abb. N. C.*, 292, where the cases are collected.

§ 147. *Time of presentation*.—If such a statute makes the time of presentation a part of the condition, the complaint must show compliance in respect to time.

Reining vs. City of Buffalo, 102 *N. Y.*, 308. (Reviewing the cases.)

[*Compare Wise vs. Hogan*, 77 *Cal.*, 184 ; s.c., 19 *Pac.*, 278. (Holding that, in a suit against an administrator, an allegation that the claim was presented within ten months after first publication of notice to creditors, without alleging the value of the estate—*Cal. Code Civ. Proc.* providing that four or ten months' notice, shall be given according to the value of the estate—does not make the complaint bad on general demurrer, though defective.)]

AUTHORITY. [See also AGENCY, and "DULY," below.]

§ 148. Statute authority.

§ 150. Revocation.

149. Relation of husband and wife.

§ 148. *Statutory authority*.—In pleading a contract made by authority of a public general statute, it is not necessary to state or refer to the statute.

Shaw vs. Tobias, 3 *N. Y.*, 188.

Municipal authority to issue bonds, if conferred by special statute, must be alleged, either by direct allegation or by the terms of the bond annexed to the pleading. *County of Jefferson vs. Lewis*, 20 *Fla.*, 980 ; *Hopper vs. Town of Covington*, 118 *U. S.*, 148.

§ 149. *Relation of husband and wife*.—Alleging that an act was done by the wife for her husband, or by the husband for his wife, is not a sufficient allegation of her authority as agent for him.

Schullhofer vs. Metzger, 7 *Robt. (N. Y.)*, 576. (Money borrowed. Denying leave so to plead, because it would be insufficient.)

s. p., recognized in *Krumm vs. Beach*, 96 *N. Y.*, 398.

To same effect, *Brief on Facts*, §§ 112, 113.

§ 150. *Revocation*.—An allegation that one revoked an authority he had given, sufficiently imports, on demurrer, notice to other parties, if notice be necessary to constitute revocation.

Frets vs. Frets, 1 *Cow. (N. Y.)*, 335; *Allen vs. Watson*, 16 *Johns. (N. Y.)*, 205.

1 *Chitt. Pl.*, 16 *Am. ed.*, 244, citing *Marsh vs. Bulteel*, 5 *B. & Ald.*, 507; 8 *Rep.*, 81, *b*.

BILL OF PARTICULARS.* [See also ACCOUNTS, and DOCUMENTS, below.]

§ 151. *Not considered on demurrer*.—At common law neither a bill of particulars,¹ nor a notice of special matter² to be proved under the general issue, is demurrable; nor is the pleading to which it is auxiliary helped³ or hurt by it on demurrer.⁴

Otherwise of an account or exhibit made by statute or settled practice a part of the pleading with which it is filed or served.⁵

¹ *Cicotte vs. Wayne County*, 44 *Mich.*, 173. (Error to sustain demurrer on the ground that the bill of particulars was a part of the declaration, and made it appear that the cause of action was not suable against defendant county. GRAVES, J., said: "The bill is often mentioned as being an amplification of the declaration or as entitled to be considered as a part of the pleading. But such expressions are metaphorical. The bill is

* There are two means of obtaining particulars besides moving to make more definite and certain: (1) By applying to the Court or judge for an order that the party furnish a bill of particulars. This is a common-law power which the Court in its discretion may exercise in all cases, civil and criminal; and it is expressly recognized by the Codes,¹ and applies as well to defences as to causes of action² and counterclaims.³ (2) By demanding that a party who has referred to an account in his pleading furnish a copy thereof or be precluded from giving evidence of it. This right is purely statutory and does not apply to claims which are not matter of account; and it requires no order of judge or Court, except that if the demand be not complied with, an order is necessary to preclude evidence on the trial.⁴

Besides these means, there are statutes in a number of the States requiring accounts, etc., sued on to be filed as exhibits.⁵

¹ *Crim. Brief*, p. 46, § 80, etc.

² 2 *Abb. New Pr. & F.*, 471.

³ *Kelsey vs. Sargent*, 100 *N. Y.*, 602.

⁴ 2 *Abb. New Pr. & F.*, 469.

⁵ See these collected under RECEPTION OF EVIDENCE.

never in strictness a component of the pleading. It may have the effect of a pleading in so far as it restricts the proof to what it contains. To consider it as pleading would be a circuitous return to the practice of special pleading within certain limits; and this would contradict one of the necessary implications of the introduction of bills of particulars. . . . A plea or demurrer to a bill of particulars would be an anomaly.")

- * *Henry vs. United States*, 22 *Ct. Cl.*, 75. (Suit for infringement, with notice of special defences.)
- * *Bowling vs. McFarland*, 38 *Mo.*, 465. (Exhibits filed.)
s. p., *Curry vs. Lackey*, 35 *Mo.*, 389.
[*Compare* *Beard vs. Porter*, 124 *U. S.*, 437; s. p., 31 *Law ed.*, 490. (Holding that the bill of particulars could be referred to to show that the action was not premature.)
- * *Brown vs. College Corner, etc., Road Co.*, 56 *Ind.*, 110, 116. (Objection that a bill of particulars sets up different matter from that pleaded cannot be reached by demurrer, for demurrer is addressed to the pleading, not to the bill filed with it.)
- Bougher vs. Scobey*, 16 *Ind.*, 151. (Defects in bill of particulars filed with a sufficient answer cannot be reached by demurrer.)
- Abell vs. Penn Mutual Life Ins. Co.*, 18 *W. Va.*, 400. (Vagueness of bill not ground for demurrer; but only taken advantage of by excluding plaintiff's evidence, under *W. Va. Code*, ch. 130, § 46.)
- * *Wills vs. Churchill*, 78 *Me.*, 285; s. c., 4 *Atl. Rep.*, 693. (Sustaining pleading because defect was thus supplied.)
[See also ACCOUNT, above, and DOCUMENTS, below].

BONA FIDE PURCHASER.

§ 152. *Conclusion of law*.—A general allegation that the party is a bona fide purchaser or an innocent purchaser is a mere conclusion of law and insufficient.

Rorer Iron Co. vs. Trout, 83 *Va.*, 397, 416, and *cas. cit.*; s. c., 5 *Am. St. Rep.*, 285.

Wing vs. Hayden, 10 *Bush (Ky.)*, 276.

s. p., *Boone vs. Chiles*, 10 *Pet. (U. S.)*, 177, 211.

BY-LAWS.

§ 153. *Must be pleaded*.—A by-law of a corporation, whether municipal or otherwise, cannot be noticed by

the Court without pleading ; but must be alleged, whether sought to be enforced by action or set up as a protection.

Harker vs. Mayor, etc., of New York, 17 *Wend. (N. Y.)*, 201. (Demurrer to plea. *Held*, that the rule was the same although the statute provided that the by-law might be read in evidence from the official publication.)

CAUSE AND EFFECT.

§ 154. *Relation between wrong and injury must be shown.*—A declaration which besides showing that defendant has committed a tort, and that plaintiff has sustained damage, does not also show that the damage is the clear and necessary consequence of the tort, is bad on demurrer.

Dawe vs. Morris, 149 *Mass.*, 188, 191.

COLLUSION. [See also **CONFEDERACY**, **CONSPIRACY**, and **FRAUD**, below.]

§ 155. *Must be specially stated.*—A general allegation of collusion and fraud, without stating facts constituting them, is not sufficient on demurrer, for it is a mere conclusion.

Wood vs. Amory, 105 *N. Y.*, 278, 282. (So holding of a complaint against one who recovered a judgment, and his assignee, alleging that they fraudulently colluded and concealed a mistake in the judgment.)

Borden vs. Murphy (N. J. V. C., 1886), 3 *Centr. Rep.*, 377. (An allegation, in a cross-bill in a lien case, that a party to a previous cause, in making a motion therein, combined and colluded with another party to injure and defraud the complainant, is not sufficient for want of allegation of the facts as to the object of the combination and the means of injury. Hence it may be struck out as not requiring an answer.)

[*Contra*, see *Berney vs. Drexel*, 33 *Hun (N. Y.)*, 34, 419, aff'g 63 *How. Pr.*, 179.]

COMPULSION.

§ 156. It is the better opinion that under the New Procedure a general allegation that the party was compelled by another to do an act is not bad on demurrer because the particulars are not also stated.¹

An allegation that he was compelled by the judgment of a court of competent jurisdiction, describing the suit, though without stating in what court, is deemed sufficient ; for a general demurrer admits the recovery to have been in a court of competent jurisdiction.²

¹ *Zimmerman vs. Kinkle*, 108 *N. Y.*, 282. (Action to cancel bond : allegation that it " was given for no consideration, but was extorted from the plaintiff." If not sufficiently definite the remedy was by motion.)

Brazil Block Coal Co. vs. Gaffney, 119 *Ind.*, 455 ; s. c., 4 *L. R. A.* 850 ; s. c., 6 *R. R. & Corp. L. J.*, 152, 21 *North East.*, 1102. (Action by a servant for injuries received in his employment. Allegation that he, being an employé of defendant, was with defendant's knowledge and consent, " directed, ordered and compelled " to do an act, without stating the facts constituting the compulsion, is sufficient on demurrer and would be so without the word " compelled." The Court say the objection should be raised by motion to make more specific.)

s. p., at common law, *Packard vs. Hill*, 7 *Cow.*, 434, 442, aff'd in 5 *Wend.*, 375.

[*Contra*, *Commercial Bank of Rochester vs. City of Rochester*, 41 *Barb. (N. Y.)*, 341. (Action to recover back a tax : allegation that plaintiff was compelled to and did pay under protest and by compulsion, and not voluntarily, to said defendant a specified sum, *held*, bad. After amendment the allegation of compulsion was disregarded on the trial, 42 *id.*, 488, because the facts showed voluntary payment.)]

² *Packard vs. Hill*, 7 *Cow. (N. Y.)*, 434, aff'd in Ct. of Err. 5 *Wend.*, 375 (on general demurrer). But such an allegation was bad on special demurrer, *Patton vs. Foote*, 1 *Wend.*, 207.

CONCEALMENT.

§ 157. *Effect of allegation.*—An allegation of conceal-

ment of a cause of action is not equivalent to an allegation of fraudulent concealment.¹

An allegation of concealment of the person by living under a false name is not equivalent to an allegation of absence.²

¹ *Brunson vs. Ballou*, 70 *Iowa*, 34 ; s. c., 29 *North West. Rep.*, 794. (Under statute of limitations.)

² *Engel vs. Fisher*, 102 *N. Y.*, 400, rev'g 51 *Super. Ct. (J. & S.)* 71 ; s. c., 15 *Abb. N. C.*, 72.

CONFEDERACY. [See also AGENCY, COLLUSION, and CONSPIRACY.]

§ 158. *Tort committed through agent or confederate.*—In an action for an injury done by several, by means of a conspiracy or combination, an allegation (after stating the conspiracy) that one in pursuance thereof did the act in question is good on demurrer as against all; for in judgment of law it is the act of all.¹

So an allegation that one defendant, at the instigation and request of the other, entered, etc., and that the latter employed the former to do so, is a good allegation of a trespass by the latter.²

¹ *Tappan vs. Powers*, 2 *Hall*, 277.

² *Ives vs. Humphreys*, 1 *E. D. Smith*, 196. (A complaint against two defendants for a trespass is not bad because it alleges one entered, etc., at the instigation and request of the other, according to the fact, instead of alleging that both entered, etc., according to the legal effect.)

CONSENT. [See also CONTRACTS.]

§ 159. *General allegation.*—An allegation or denial of consent is a matter of fact, and not a conclusion of law (unless the details relied on to support it are stated); and an allegation and denial of it form a material issue.

Kemeys vs. Richards, 11 *Barb. (N. Y.)*, 312.
s. p., *Millard vs. Shaw*, 4 *How. Pr. (N. Y.)*, 137. (Execution returned without waiting sixty days, by defendant's consent.)

CONSPIRACY. [See also CONFEDERACY.]

§ 160. *Damage necessary*.—A complaint for conspiracy is bad on demurrer unless it shows resulting damage.

Douglass vs. Winslow, 52 *N. Y. Super. Ct. (J. & S.)*, 439.

CONTRACTS. [See also AGENCY, CAPACITY, COMPULSION, DAMAGES, DATE, DELIVERY, DOCUMENTS, FRAUD, ILLEGALITY, OWNERSHIP, PAYMENT.]

A. *The Making of the Contract.*

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| § 161. Implied contract.—Facts raising implied promise. | § 167. — — where it does not appear to be oral. |
| 162. Express contract.—Technical words not necessary. | 168. — Agency in making. |
| 163. — Mutuality. | 169. — — contract not purporting to be that of the party. |
| 164. — Execution and delivery. | 170. — — appearing on the face of the contract. |
| 165. — Seal. | |
| 166. — Statute of frauds where contract appears to be oral. | |

B. *Terms.*

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| § 171. Legal effect. | § 172. Term omitted implied by law. |
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C. *Consideration.*

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| § 173. Necessity of alleging. | § 175. Executed consideration. |
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D. *Extrinsic Facts.*

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| § 177. Oral to vary writing. | § 178. Usage or custom to aid. |
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E. *Performance of Conditions.*

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| § 179. Performance on plaintiff's part. | § 185. Form of allegation under the statute. |
| 180. — exception or proviso. | 186. Performance by acts of third persons. |
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| 182. Form of allegation at common law. | 188. Mutual and dependent conditions. |
| 183. Statutes sanctioning allegation that he duly performed. | 189. Conditions subsequent. |
| 184. — what are conditions within the statute. | 190. Excuses for non-performance of conditions. |

F. *Breach.*

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| § 191. Necessity of allegation,—in money contracts. | § 194. Allegation in terms of contract. |
| 192. — in other actions. | 195. Exception or proviso. |
| 193. General allegation. | 196. Several parties indebted. |
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G. *Instruments for the Payment of Money only.*

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|------------------------------------------------------|----------------------------|
| § 198. What are within the statute. | § 200. Form of allegation. |
| 199. Validity, execution, ownership, and conditions. | 201. Language. |

A. *The Making of the Contract.*

§ 161. *Implied contract.*—*Facts raising implied promise.*—A complaint is good on demurrer which states facts from which the law raises an implied promise, although it do not allege a promise.

Otherwise if it neither alleges a promise nor all the facts necessary to imply a promise.

Bouslog vs. Garrett, 39 *Ind.*, 338. (Allegation of account stated.)

s. p., *La Guerra vs. Newhall* (*Cal.*, 1880), 5 *Pacific C. L. J.*, 413.

Wonsetter vs. Lee, 40 *Kans.*, 367; s. c., 19 *Pacif. Rep.*, 862. (Sustaining a complaint,—which was bad on demurrer, as setting up an oral contract void under the statute of frauds,—because it also contained allegations raising an implied promise to pay a quantum meruit.)

Milliken vs. Western Union Tel. Co., 110 *N. Y.*, 403; s. c.,

- 18 *State Rep.*, 328 ; rev'g 53 *Super. Ct.*, 111. (Valuable services rendered on request.)
- Graham *vs.* Dunnigan, 4 *Abb. Pr. (N. Y.)*, 426 ; s. c., less fully, 6 *Duer*, 629. (Co-tenant's action for contribution to taxes paid.)
- Farron *vs.* Sherwood, 17 *N. Y.*, 227.
- Jordan Skaneateles Plank Road Co. *vs.* Morley, 23 *N. Y.*, 552. (Use of turnpike road without paying toll.)
- Byxbie *vs.* Wood, 24 *N. Y.*, 607, aff'g Sheldon *vs.* Wood, 2 *Bosw.*, 267.
- Glenny *vs.* Hitchins, 4 *How. Pr. (N. Y.)*, 98. (Sale and delivery of goods, not alleging promise to pay. Demurrer overruled, because the only effect of alleging it would be to invite an immaterial denial of a legal inference.)
- Chitty says that to omit the allegation of a promise is untechnical. 1 *Chitt. Pl.*, 16 *Am. ed.*, 309.

§ 162. *Express contract.*—*Technical words not necessary.*—Under the New Procedure, an allegation of a contract does not require any particular technical words. It is enough if the intent is clear.

- Heichew *vs.* Hamilton, 3 *G. Gr. Iowa*, 596. ("Express understanding and agreement" enough.)
- Spence *vs.* Spence, 17 *Wisc.*, 448 (same effect).
- s. p., North *vs.* Kizer, 72 *Ill.*, 172. (Declaration in assumpsit good without the word "promised.")
- Todd *vs.* Nelson, 109 *N. Y.*, 316, 325. (A finding that there was no delivery of a deed, held error in law because the complaint assumed delivery and alleged that the grantees "obtained" the deed for, etc., and the answer did not deny executing, and implied delivery.)
- Smith *vs.* Johnson, *Hill & D. Supp.*, 240. (Allegation between vendor and purchaser, that certain incumbrances were to be paid by the purchaser, held to import a promise to pay.)
- Compare First National Bank *vs.* Fair, 127 *Pa. St.*, 324. (Allegation that a payment alleged to have been made "was to apply on" a specified demand, not an allegation of an agreement so to apply it.)
- Compare also Brunswick & Western Railway Co. *vs.* Clem, 80 *Ga.*, 534. (An action for personal injuries. Held, that a plea "that plaintiff was after his injury, prior to this suit, employed by defendant, and paid for his services on the faith of statement and agreement by him that he intended not to sue for damages," was properly

stricken out, as it failed to specify to whom the statement was made, or with whom agreement was made, and not alleging they were made to or with defendant.)

§ 163. *Mutuality*.—Where mutuality is necessary to sustain a contract, a mere allegation of making an apparently unilateral contract is not enough.¹

And if the pleader sets forth an offer accepted, his allegation must show an express acceptance² unqualified,³ or acts that may be presumed to have been equivalent.⁴

¹ *Sanborn vs. Rodgers* (*Ct. W. D. Mich.*), 33 *Fed. Rep.*, 851. *Robinson Consol. Min. Co. vs. Johnson*, 13 *Colo.*, 258; s. c., 22 *Pacif. Rep.*, 459. (Allegation that plaintiff entered into a contract with defendant to furnish, etc., without alleging that defendant agreed to take.)

² *Billings vs. Sanderson*, 8 *Mont.*, 201; s. c., 19 *Pacif. Rep.*, 307. (Allegation of contract to purchase, under circular issued by railroad company, but not alleging notice of acceptance, bad.)

Wiley vs. San Pedro, etc., Co. (*N. Mex.*), 20 *Pacif. Rep.*, 115. (Allegation of offer requiring acceptance by signature, and nothing to show that but "accepted" indorsed without signature, bad.)

³ *Greenawalt vs. Este*, 40 *Kans.*, 418; s. c., 19 *Pacif. Rep.*, 803. (Allegation of offer to sell, accepted by agreeing to pay at a place not mentioned in the offer, bad.)

⁴ *Franklin Needle Co. vs. Town of Franklin* (*N. H.*, 1889), 18 *Atl. Rep.*, 318. (Allegation of offer of exemption from tax if plaintiff would go on and build his mill; allegation that relying on the offer, he actually did go on and build it,—*held*, sufficiently to imply acceptance.)

§ 164. *Execution and delivery*.—An allegation of making,¹ executing² or indorsing³ and the like, the parties to the act being designated,⁴ sufficiently imports, on demurrer, whatever acts are essential to the validity of effectual execution, such as delivery in the case of a note or deed, and acknowledgment in the case of a married woman's deed; unless the instrument is such that acceptance cannot be presumed, such as an assignment in trust.⁵

But where time of execution is material, and the spe-

cific time is to be determined by the time of delivery, an allegation or denial of making at a specified time is not equivalent to saying delivery at that time.⁶

And if delivery and acceptance is admitted, a denial that any contract was thereby made is unavailing, being a mere conclusion.⁷

¹ *Chappell vs. Bissell*, 10 *How. Pr. (N. Y.)*, 274; *Burrall vs. De Groot*, 5 *Duer (N. Y.)*, 379.

Munro vs. Alaire, 2 *Cal.*, 320. (Alleging an award was made, imports it was ready to be delivered.)

² *Bull vs. Malony*, 27 *Conn.*, 560. (Strict foreclosure : allegation that respondent executed to petitioner a deed of the land, equivalent (on default) to an allegation that he conveyed.)

s. p., *Parkinson vs. Boddiker*, 10 *Colo.*, 503 ; *s. c.*, 15 *Pacif. Rep.*, 806.

Romans vs. Langevin (Minn., 1885), 25 *North West. Rep.*, 638. ("Made and entered into" a written agreement, imports delivery. Citing *Churchill vs. Gardner*, 7 *T. R.*, 596.)

Lafayette Ins. Co. vs. Rogers, 30 *Barb. (N. Y.)*, 491, and cases cited. (Action on specialty : demurrer held frivolous.)

Thorp vs. Keokuk Coal Co., 48 *N. Y.*, 253. (Express admission of execution of deed to defendant, precludes proof that it was not delivered.)

Roberts vs. Good, 36 *N. Y.*, 408. (Undertaking.)

Todd vs. Nelson, 109 *N. Y.*, 316, 325. (The Court say the word "executing" may appear from the context to include the whole formality of making a valid conveyance.)

Brinkerhoff vs. Lawrence, 2 *Sandf. Ch. (N. Y.)*, 400.

Douthit vs. Mohr, 116 *Ind.*, 482 ; *s. c.*, 18 *North East.*, 449. (Allegation that a person "entered into" a contract in writing means executed, and implies a delivery and acceptance of it.)

Cheney vs. Cook, 7 *Wisc.*, 413, 423. (Allegation that defendant "executed" a written agreement, equivalent to saying "subscribed." Code rule of liberal construction requires this.)

s. p., *Auditor vs. Woodruff*, 2 *Ark.*, 73 ; *s. c.*, 33 *Am. Dec.*, 368. (Allegation that the bond sued upon is writing obligatory of defendants, sufficiently imports delivery.)

Moore vs. Tibman, 33 *Ill.*, 358. (Mortgage.)

[*Contra*, *Hatch vs. Peet*, 23 *Barb.*, 575. (Allegation that

a party did "execute a release," *held*, not sufficient without stating the manner, whether under seal, etc. But this case is not authority for holding the defect reached by demurrer. Motion is the remedy.)]

- ¹ *Bank of Lowville vs. Edwards*, 11 *How. Pr. (N. Y.)*, 216. (Intimating that if the allegation be defective, the remedy was by special demurrer, *i.e.*, now by motion to make more definite and certain.)

Lloyd vs. Howard, *L. J. 20 Com. L.*, 1. (The rule of law is that an indorsement consists not only of the writing of the indorser, but also of a delivery of the bill with the intention of passing the property in the bill. Thus an allegation of indorsement to B may be denied if there was no delivery to him.)

- ⁴ *Nat'l City Bank vs. Westcott*, 118 *N. Y.*, 468, *rev'g* 43 *Hun*, 637. (Allegation that a note properly indorsed was presented to plaintiff by D. as agent of defendant, not equivalent to an allegation that it was indorsed by defendant.)

Compare Jones vs. Dow, 137 *Mass.*, 119. (Allegation that the makers of a note entered into the following contract, indorsed upon the note,—“We hereby guarantee the payment of the within note,”—and that the note in such condition was indorsed to the plaintiff for valuable consideration, etc. *Held*, that the objection that there was no express averment that the guarantee was made to the plaintiff could not avail.)

- ⁴ *Joseph vs. Dougherty*, 60 *Cal.*, 358, *abst.*; *s. c.*, 13 *Reporter*, 653. (The Court say that her acknowledgment being essential to validity, until acknowledged it is not executed, but when executed it is acknowledged; for when it is said that an instrument is “executed,” every act is imported which is requisite to make it operative and effective.)

[For other cases see *Mechanics' Bank vs. Spring Valley Shot Co.*, 25 *Barb.*, 419; *Griswold vs. Lavery*, 3 *Duer (N. Y.)*, 691; *N. Y. Marbled Iron Works vs. Smith*, 4 *id.*, 362; *Price vs. McClave*, 6 *Duer*, 544; *Prindle vs. Caruthers*, 15 *N. Y.*, 425; *LaFayette Ins. Co. vs. Rogers*, 30 *Barb.*, 491.]

- ⁷ *Budd vs. Kramer*, 14 *Kans.*, 101.

- ⁴ *Mallory vs. Lamphear*, 8 *How. Pr. (N. Y.)*, 491.

Union Mut. Ins. Co. vs. Commercial Mut. Marine Ins. Co., 2 *Curt.*, 524; *s. c.*, 8 *Law Rep., N. S.*, 610. And see *affirmance*, 19 *How. (U. S.)*, 318.

s. p., *Buffalo Catholic Ins. vs. Bitter*, 87 *N. Y.*, 250. (Allegation that by a contract set forth A agreed to buy and

B to sell, unavailing, if the agreement shows it was by some one else.)

- s. P., *Lockart vs. Roberts*, 3 *Bibb (Ky.)*, 361. (Plea "that the paper was blank when signed, and so it is not his deed," insufficient without stating that it was blank when delivered.)

§ 165. *Seal*.—At common law to maintain an action of covenant, the declaration is bad on demurrer if it does not expressly allege that the instrument was under seal, either in terms, or by describing it as an "indenture," or a "deed," or a "writing obligatory,"¹ each of which phrases sufficiently imports a seal.² Neither giving a copy with a testificandum clause saying "our hands and seals," nor adding a scroll or "L. s." in a copy pleaded, is enough as against demurrer. Nor does the word "release" import a seal.³

Under the New Procedure it is the better opinion that an allegation that the parties conveyed, or one executed to the other a deed, or a mortgage, or the like, suffices on demurrer to import a seal whenever a seal is necessary.⁴

¹ *Van Santwood vs. Sanford*, 12 *Johns. (N. Y.)*, 197; *Maccomb vs. Thompson*, 14 *id.*, 207.

s. P. in debt. *Dictum* in *Jenkins vs. Pell*, 17 *Wend. (N. Y.)*, 417. In affirming this decision in 20 *id.*, 450, the chancellor says: "Where the law requires an instrument to be under seal to authorize a particular remedy thereon, it is necessary in pleading to state the fact that it was under seal, either in terms or in other language from which the fact that it was under seal can be legally inferred." But this seems too broad. See § 167, as to Pleading under Statute of Frauds.

² Same cases. *Magee vs. Fisher*, 8 *Ala.*, 320; *Clark vs. Phillips, Hemp.*, 294. (Writing obligatory.)

[*Contra* of the terms "indenture," "covenant," "demise," and "to farm let." *Magee vs. Fisher*, 8 *Ala.*, 320.]

Whether "indenture" implies a seal, compare *Hopewell vs. Overseers of Amwell*, 6 *N. J. L.*, 169; *Magee vs. Fisher*, 8 *Ala.*, 320.

³ See note to § 164.

¹ Webster vs. People, 92 *N. Y.*, 426. (Criminal indictment.)
 McAllister vs. Plant, 54 *Miss.*, 106. (Allegation that the corporation by its corporate name made the bonds, and "made and delivered a deed purporting to be a trust deed, and by said deed granted, sold, and conveyed," etc., imports a seal.)

Moore vs. Titman, 33 *Ill.*, 358. (Court will look at the exhibit annexed if necessary.)

s. p., Comerford vs. Cobb, 2 *Fla.*, 418.

As to the rule under statutes making an unsealed instrument equal to a sealed one, see Duncan vs. Clements, 17 *Ark.*, 279.

§ 166. *Statute of frauds*,—where contract appears to be oral.—A pleading seeking to enforce a contract which is within the statute of frauds is bad on demurrer if it shows that the contract was oral, and does not show that it was made in conformity to the statute,¹ or that the case is within some exception to the statute.²

¹ Randall vs. Howard, 2 *Black U. S.*, 585, 589. (The bill sought to establish a trust.)

Barr vs. O'Donnell, 76 *Cal.*, 469; s. c., 18 *Pac. Rep.*, 429. (Bill to establish a trust.)

Cloud vs. Greasley, 125 *Ill.*, 313. (Bill for specific performance. *Held*, demurrer is a proper remedy where the bill shows on its face that the agreement to convey is an oral one. [Citing also Walker vs. Locke, 5 *Cush.*, 90; Slack vs. Black, 109 *Mass.*, 496; Ahrend vs. Odiorne, 118 *Mass.*, 268; Farnham vs. Clements, 51 *Me.*, 426; Walker vs. Ray, 111 *Ill.*, 315.]

Krohn vs. Bantz, 68 *Ind.*, 277; overruling Harper vs. Weller, 27 *id.*, 277.

Linn Boyd Tobacco Warehouse Co. vs. Terrell, 13 *Bush (Ky.)*, 463. (General demurrer enough.)

Walker vs. Locke, 59 *Mass.* (5 *Cush.*), 90; Campbell vs. Brown, 129 *Mass.*, 23; Slack vs. Black, 109 *id.*, 496.

Wentworth vs. Wentworth, 2 *Minn.*, 277.

Howard vs. Brower, 39 *Ohio St.*, 402. (Demurrer lies if it is fairly to be inferred from the pleading that the agreement was oral.)

Macy vs. Childress, 2 *Tenn. Ch.*, 438.

But if the pleading alleges facts which raise an implied promise, not impaired by the statute, it may be sus-

tained in that aspect. *Wonsetter vs. Lee*, 40 *Kans.*, 367; s. c., 19 *Pacif. Rep.*, 862.

² *Arguello vs. Edinger*, 10 *Cal.*, 150, 160. (Ejectment: answer setting up an oral agreement for the sale of the land, and praying a specific performance of it, *held*, not demurrable; because it also averred acts of part performance, which took the case out of the statute.)

Shank vs. Teeple, 33 *Iowa*, 189. (*Held*, that if it is averred that a parol agreement within the statute has been executed, it is no longer in parol, and demurrer will not lie.)

Burrow vs. Terre Haute, etc., R. Co., 8 *North East. Rep.*, 167. (After stating a contract without indicating that it was in writing, a further statement, "a copy of said written contract is herewith filed and made a part of this answer," is a sufficient allegation that it was in writing.)

Whether the law of the place of making the contract or of the forum applies, see *Marie vs. Garrison*, 13 *Abb. N. C.*, 210, 243; *Read on Stat. of F.*, 18, n. (v); *Adams vs. Clutterbuck*, *Q. B. Div.*, Feb. 1883.

§ 167. — *where contract does not appear to be oral.*—A pleading seeking to enforce a contract which is within the statute of frauds, is not demurrable because it does not affirmatively show that it was made in conformity to the statute, or within some exception. It is enough that it does not show it was oral or otherwise without conformity to the statute.¹

Under statutes requiring written instruments sued on to be filed or furnished as exhibits, the failure to allege or file a writing sufficiently shows that the contract was not in writing.²

¹ *Sanborn vs. Rodgers* (*C. Ct. W. D. Mich.*), 33 *Fed. Rep.*, 851.

Manning vs. Pippen, 86 *Ala.*, 357; s. c., 5 *South. Rep.*, 572. (Holding that to authorize the statute of frauds to be raised by demurrer "the bill must show affirmatively that the contract or promise declared on was not in writing.")

Broder vs. Conklin, 77 *Cal.*, 330; s. c., 19 *Pacif. Rep.*, 513.

Hunt vs. Hayt, 10 *Colo.*, 278, 15 *Pac.*, 410.

Horner vs. Frazier (*Md.*, 1886), 3 *Centr. Rep.*, 700.

Price *vs.* Weaver, 13 *Gray* (*Mass.*), 272; Elliott *vs.* Jenness, 111 *Mass.*, 29.

Krom *vs.* Bantz, 68 *Ind.*, 277.

Sherwood *vs.* Saxton, 63 *Mo.*, 78.

Marston *vs.* Swett, 66 *N. Y.*, 206; Cozine *vs.* Graham, 2 *Paige* (*N. Y.*), 177; Harns *vs.* Knickerbacker, 5 *Wend.* (*N. Y.*), 638 (*Ct of Err.*); Livingston *vs.* Smith, 14 *How. Pr.* (*N. Y.*), 490.

Green *vs.* Seymour, 59 *Vt.*, 459; s. c., 5 *New Eng. Rep.*, 367, 12 *Atl. Rep.*, 206.

River Falls Bank *vs.* German American Ins. Co., 72 *Wisc.*, 535; s. c., 40 *North West. Rep.*, 506.

[For other cases on the subject see *Rigby vs. Norwood*, 34 *Ala.*, 129; *Robinson vs. Tipton*, 31 *Ala.*, 595; *Brown vs. Adams*, 1 *Stew. (Ala.)*, 51; *Nunez vs. Morgan*, 77 *Cal.*, 427; s. c., 19 *Pac. Rep.*, 753; *McDonald vs. Mission View Homestead Assoc.*, 51 *Cal.*, 210; *Wakefield vs. Greenhood*, 29 *Cal.*, 597; *Miller vs. Upton*, 6 *Ind.*, 53; *Walker vs. Richards*, 39 *N. H.*, 259; *Sterns vs. St. Louis & C. R. R. Co.*, 4 *N. Y. St. Rep.*, 715.]

[*Contra*, *Duncan vs. Clements*, 17 *Ark.*, 279.

[*Babcock vs. Meek*, 45 *Iowa*, 137 (under *Iowa Code*, § 2648).

[*Hocker vs. Gentry*, 3 *Metc. (Ky.)*, 463; *Smith vs. Fah*, 15 *B. Monr. (Ky.)*, 443.]

² *Goodrich vs. Johnson*, 66 *Ind.*, 258. (Holding that, under the Indiana Code, if a contract be in writing a copy must be filed with the complaint, and if it is not alleged to be in writing and no copy is filed, the presumption arises that the contract declared on is not a written one, and if the contract is such as is required by the statute of frauds to be in writing, the objection may be taken by demurrer.)

[For these statutes see DOCUMENTS, below.]

§ 168.—*Agency in making*.—An allegation that a party “made” the contract alleged, “by his agent,” is sufficient on demurrer, although it does not state that the alleged agent was authorized; for making by agent necessarily implies authority.

Childress vs. Emory, 8 *Wheat.*, 642; s. c., 5 *Law ed.*, 705. (Nor is it necessary to state that he signed it.)

Nichols vs. James, 130 *Mass.*, 589. (Action against B. J. and two others, upon notes signed “J. Man. Co., B. J., agent.” Declaration alleged that defendants were partners,

under the name of the J. Man. Co., and by their agent, B. J., made their notes, etc. It appeared that B. J. was not a partner as between themselves, but was liable by holding himself out as such. *Held*, that all were liable, without amendment of the declaration.)

Regents of the Univ. vs. Detroit Young Men's Soc., 12 *Mich.*, 138.

Tarver vs. Garlington, 27 *S. C.*, 107; s. c., 2 *South East. Rep.*, 846. (So holding even though the contract appeared on its face to be that of the agent.) [The Court say that for the purposes of the demurrer the objection to varying the contract by parol is waived; but compare to the contrary § 177.]

Otherwise where the proceeding is against the agent to charge him with liability for the act as done by him personally. *Trenholm vs. Commercial Nat. Bank*, 38 *Fed. Rep.*, 323; *Gaffney vs. Colvill*, 6 *Hill (N. Y.)*, 567.

§ 169.—*contract not purporting to be that of the party.*—

Where a contract set forth in pleading appears on its face to be the contract, not of the party sought to be charged, but of a third person who executed it, although he is described in the contract as agent, the pleading is bad on demurrer, even though it alleges the contract to have been that of the party sought to be charged.¹

But if it be not under seal, the pleading is made sufficient by adding allegations showing that the latter was the real party in interest and the other his authorized agent.²

¹ *Buffalo Catholic Inst. vs. Bitter*, 87 *N. Y.*, 250; abstr. s. c., 13 *Weekly Dig.*, 512. (Action against corporation, on contract to purchase land, signed by a person describing himself as president, and stipulating for approval by the corporation, as a condition of the contract.) s. P., *State ex rel. Loeb vs. Barris*, 12 *Centr. Rep.*, 79; s. c., 50 *N. J. L.*, 382, 13 *Atl.*, 602 (citing cases).

[Compare, *Avery vs. Dougherty*, 102 *Ind.*, 443; s. c., 2 *North East. Rep.*, 123.]

Williams vs. Uncompahgre Canal Co., 13 *Colo.*, 469; s. c., 22 *Pacif. Rep.*, 808.

Otherwise if ratification be alleged. See *Chapman vs. Lee*, 47 *Ala.*, 143.

[The rule of law obtaining in the jurisdiction as to

whether such a contract is binding on the party supposed to be interested should be considered in applying these rules. The authorities are full of conflict. See note in 12 *Abb. N. C.*, 12.]

- * *Arnold vs. Bernard*, 8 *Abb. Pr. N. S. (N. Y.)*, 116. (So holding even though the testificandum clause recites that it was sealed.)

State *ex rel.* *Loeb vs. Barris* (above cited).

- [*Compare Atlanta & West Point R. R. Co. vs. Texas Grate Co.*, 81 *Ga.*, 602. (Action for damages to goods *in transitu*. Holding that where plaintiff claimed to have an agent, such agency should be alleged as well as proved, and the contract should be set out "as made with the principal through the agent;" and if the terms be "to pay to the agent" or "to deliver goods to him," they should be recited as they were in fact.)]

§ 170. — *execution by agency,—appearing on face of contract.*—Where a contract pleaded must have been made by agent if at all,¹ or where it is set forth in pleading and appears on its face to be the contract of the party sought to be charged, but was executed by the hand of his agent,² an allegation that it was the contract of the party, without saying anything of the agency, is sufficient.

- ¹ *Delafield vs. Kinney*, 24 *Wend. (N. Y.)*, 345. (Even though statute requires corporation contract to be signed by specified officers, allegation that the corporation made the contract is enough.)

- * *Many vs. Beekman Iron Co.*, 9 *Paige (N. Y.)*, 188; *Begwellin vs. Lee*, 8 *N. Y. State Rep.*, 798.

Ohio., etc., *R. Co. vs. Middleton*, 20 *Ill.*, 629.

s. p., *Fraser vs. Spofford*, 5 *Blackf. (Ind.)*, 207.

- Johnston vs. Taylor*, 15 *Abb. Pr. (N. Y.)*, 339. (In pleading a deed executed by a married woman, if the pleader states it was executed by attorney, he must also state the facts which make the case one in which such mode of execution is valid, or his pleading is demurrable.)

B. *Terms.*

§ 171. *Legal effect.*—The rule that a contract may be pleaded according to its legal effect¹ does not mean that

it is enough to allege the legal effect,—as for instance that the party made a mortgage to the plaintiff, and under it plaintiff became entitled to possession.² The substance, so far as material to the pleader's case, must be stated.

Particulars not material to the case may be omitted.³

¹ *Higgins vs. McDonnell*, 82 *Mass.* (16 *Gray*), 386.

Brown vs. Champlin, 66 *N. Y.*, 214, 219.

² *Fairbanks vs. Bloomfield*, 2 *Duer* (*N. Y.*), 349.

³ *Dunham vs. Eaton, etc., R. Co.*, 1 *Bond*, 493, 497.

§ 172. *Term omitted, implied by law.*—In pleading, by legal effect, an instrument which fails to state some term of the contract, which, however, the law supplies,—as where a contract does not specify the time for performance, the law thereupon implying a reasonable time,—it is not necessary to supply in allegation the term thus omitted; but the law aids the pleading as it does the instrument.

Herrick vs. Bennett, 8 *Johns.*, 374.

Okie vs. Spencer, 2 *Wharton* (*Pa.*), 253; s. c., 30 *Am. Dec.*, 251.

s. p., *Holmes vs. West*, 17 *Cal.*, 623.

Contra, *Bacon vs. Page*, 1 *Conn.*, 404; *Dale vs. Dean*, 16 *id.*, 579.

But if the term thus implied is a condition, performance of it must be alleged. *Pope vs. Terre Haute Car & Mfg. Co.*, 107 *N. Y.*, 61; s. c., 13 *North. East. Rep.*, 592; *Richardson vs. Jones*, 1 *Nev.* 405, 49.

C. *Consideration.*

§ 173. *Necessity of alleging.*—A pleading on contract need not expressly allege a consideration, if the contract is negotiable paper,¹ or an instrument under seal,² or given pursuant to the requirement of a statute,³ or if it is

an instrument pleaded by copy and containing a recital of consideration.⁴

In other cases in the absence of statute to the contrary,⁵ omitting to show consideration is a demurrable defect.⁶

If a contract is of a nature to require a peculiar consideration,—such as a contract in restraint of trade,⁷ or a compromise,⁸—the necessary kind of consideration must appear.

⁴ *Underhill vs. Phillips*, 10 *Hun* (N. Y.), 591. (Omission of "value received" immaterial.)

Fisher vs. Fisher, 113 *Ind.*, 474; s. c., 13 *West.*, 295, 15 *North East.*, 832.

Whether non-negotiable paper or a non-negotiable indorsement is also within the rule, compare *Myers vs. Craig*, 3 *How. Pr. N. S.* (N. Y.), 194, and *cas. cit.*; and *Roberts vs. Smith*, 58 *Vt.*, 492; s. c., 6 *East. Rep.*, 78.

⁵ *Northern Kansas Town Co. vs. Oswald*, 18 *Kans.*, 336.

Montgomery County vs. Auchley, 92 *Mo.*, 126; s. c., 10 *West. Rep.*, 40, 4 *Southwest. Rep.*, 425. (Bond, signed by surety long after execution by principal: error to sustain demurrer for want of allegation of consideration.)

Bush vs. Stevens, 24 *Wend.* (N. Y.), 256; *Clark vs. Thorp*, 2 *Bosw.* (N. Y.), 680.

Paddock vs. Hume, 6 *Oreg.*, 82. (Allegation of "bond or writing obligatory" implies seal sufficiently to imply consideration.)

Tyler vs. Hand, 7 *How.* (U. S.), 573, 584 (dictum).

⁶ *Slack vs. Heath*, 1 *Abb. Pr.* (N. Y.), 331; s. c., 4 *E. D. Smith*, 95; *Shaw vs. Tobias*, 3 *N. Y.*, 188. (If in accord with the statute, an allegation that it was taken pursuant to the statute is not necessary.)

⁷ *Prindle vs. Caruthers*, 15 *N. Y.*, 425, reversing 10 *How. Pr.*, 33. ("Value received" in a promissory note, enough.)

Leonard vs. Sweetzer, 16 *Ohio*, 1. ("Value received," in guaranty.)

Kellogg vs. Larkin, 3 *Pinney* (Wis.), 123; s. c., 3 *Chandler*, 133, 56 *Am. Dec.*, 164. (Declaration on contract in partial restraint of trade need not expressly aver the reason to support the restraint, if it sufficiently appears from the contract itself, which is set forth in the declaration.)

Gould Pl., 39; 1 *Chitt. Pl.*, 16 *Am. ed.*, 380. (Covenant to stand seized to uses, showing relationship, enough.)

In other conveyances the effect of which is relied on under the statute of uses, payment of a valuable consideration should be shown. 1 *Chitt. Pl.*, 380.

* *Moore vs. Waddle*, 34 *Cal.*, 145; *Williams vs. Hall*, 79 *id.*, 606; s. c., 21 *Pacif. Rep.*, 965. (Every written contract imports a consideration.) [So also by statute in several states.]

Goodpaster vs. Porter, 11 *Iowa*, 161.

Roller vs. Ott, 14 *Kans.*, 609.

Caples vs. Brautigam, 20 *Mo.*, 248. (Notes payable in money or property.)

* 1 *Chitty Pl.*, 16 *Am. ed.*, 300, 308.

Robinson vs. Barbour, 5 *Blackf. (Ind.)*, 468.

Murdock vs. Caldwell, 8 *Allen (Mass.)*, 309.

Jones vs. Dow, 137 *Mass.*, 119.

Spear vs. Downing, 12 *Abb. Pr. (N. Y.)*, 437; s. c., 34 *Barb.*, 522, 22 *How. Pr.*, 30. (The words "for her attention to my son" in the instrument, not enough.)

Douglas vs. Davie, 2 *McCord (So. Car.)*, 218.

In *Kean vs. Mitchell*, 13 *Mich.*, 207, it was said by COOLEY, J., citing authorities, that an allegation that it was "for a good and valuable consideration" is not enough on demurrer. [Under the New Procedure, motion would be the remedy for such an allegation.]

The rule applies whether the promise be in writing or oral. *Burnett vs. Bisco*, 4 *Johns. (N. Y.)*, 235.

* *Ross vs. Sagdbeer*, 21 *Wend. (N. Y.)*, 166; *Weller vs. Hersee*, 10 *Hun (N. Y.)*, 431. (Seal not enough.)

s. p., *Goodridge vs. Union Pacific R. Co. (C. Ct. D. Colo.)*, 37 *Fed. Rep.*, 182; s. c., 2 *Denv. Leg. N.*, 66.

* *Seaman vs. Seaman*, 12 *Wend. (N. Y.)*, 381. (Declaration on promise in consideration of plaintiff withdrawing caveat must show that plaintiff had an interest to prevent probate.)

s. p., *Dölcher vs. Fry*, 37 *Barb. (N. Y.)*, 152. (Promise in consideration of discontinuing proceedings.)

§ 174. *Formal words not necessary.*—A pleading on contract is not bad on demurrer for not formally alleging a consideration, if it shows by fair inference a valid consideration.

Marie vs. Garrison, 83 *N. Y.*, 14, 24, 26.

s. p., *Hessel vs. Johnson*, 70 *Wisc.*, 538; s. c., 36 *North West.*

Rep., 417. (Allegation that plaintiff sold and defendant purchased.)

Bean vs. Ayres, 67 *Me.*, 482. ("Thereupon" interpreted to mean "in consideration thereof.")

[*Compare Whithall vs. Morse*, 5 *Serg. & R. (Pa.)*, 358.]

§ 175. *Executed consideration*.—Where the consideration of the promise sued on had been executed, and the validity of the promise depends upon previous request, or benefit, or moral obligation, the previous request, or the benefit, or the moral obligation must be alleged.¹

An allegation that defendant agreed "for a valuable consideration" is enough,² unless the contract is one which the law requires a peculiar consideration for.

A mere allegation that defendant, "being indebted" or "being liable" to, etc., promised, is not enough.³ Otherwise if the indebtedness is only collaterally involved.⁴

¹ 1 *Chitt. Pl.*, 16 *Am. ed.*, 302.

Comstock vs. Smith, 7 *Johns. (N. Y.)*, 87, and Eng. cases cited; *Parker vs. Crane*, 6 *Wend. (N. Y.)*, 647; *Heren-deen vs. De Witt*, 49 *Hun (N. Y.)*, 53, (holding that where a promise to pay for a past executed consideration was made in writing, accompanied by an oral request and promise to pay for a future continuance of the like consideration, accepted and acted upon by the promisee, the complaint should set out the oral request and promise as well as the written one.)

² *River Falls Bank vs. German American Ins. Co.*, 72 *Wisc.*, 535; s. c., 40 *North West. Rep.*, 506. (Allegation that defendant, for a valuable consideration, entered into the contract described is sufficient on demurrer. If too indefinite, the remedy is by motion.)

³ *Doty vs. Williams*, 14 *Johns. (N. Y.)*, 378.

s. p., *Spear vs. Downing*, 12 *Abb. Pr. (N. Y.)*, 437; s. c., 34 *Barb.*, 522, 22 *How. Pr. (N. Y.)*, 30.

⁴ *Bates vs. Cobb*, 5 *Bosw. (N. Y.)*, 29; *Brown vs. Southern Mich. R. Co.*, 6 *Abb. Pr.*, 237.

Bailey vs. Bussing, 29 *Conn.*, 1.

Beauchamp vs. Bosworth, 3 *Bibb (Ky.)*, 115.

s. p., *Chandler vs. State*, 5 *Har. & J. (Md.)*, 284.

Maury vs. Olive, 2 *Stew. (Ala.)*, 472.

§ 176. *Unconscionable consideration*.—A declaration, or a complaint even in a legal action, which states as the cause of action a contract which is so inequitable and unconscientious that no man capable of contracting would intelligently make it, and no honest and fair man would accept it, is bad on demurrer: or if good on demurrer, the obligation to pay according to it is not admitted by the demurrer; but the damages should be assessed on equitable principles, at a nominal or other appropriate sum.

Thornborough *vs.* Whiteacre, 6 *Mod.*, 305; s. c., 2 *Ld. Raym.*, 1164. (Contract to pay £5 for delivery of two grains of rye on a certain Monday, and doubling delivery successively on every Monday for a year, found on calculation to call for 524,288,000 quarters of rye.)

Approved and followed in *Hume vs. U. S.*, 132 *U. S.*, 406, 413. (Holding that a government contractor who got a contract to furnish shucks at 60c. a pound, when the market value was only 1 $\frac{3}{4}$ c., could recover only the market value.)

[*Compare Erwin vs. Parham*, 12 *How. (U. S.)*, 197. (Purchase, at execution sale, of a chose in action of \$260,000 for \$600, sustained.)]

D. *Extrinsic Facts.*

§ 177. *Oral, to vary writing*.—A pleading which alleges or admits a written instrument, and seeks to vary its effect by allegations of negotiations or other oral matter, such as is not competent evidence to vary it, is demurrable.¹

It is the better opinion that if the pleading does not indicate that the extrinsic matter was oral and therefore incompetent, it may be presumed against demurrer that it was in writing, and the pleading be thus sustained.²

¹ *Lea vs. Robeson*, 12 *Gray*, 280. (SHAW, C. J., said: "If a party sets forth an agreement in writing, and all the circumstances to give it its proper and legal effect, and

then . . . alleges another and parol agreement, inconsistent and incompatible with the written agreement which it would not be competent to control by parol evidence, . . . the defendant may safely demur.")

Pusey vs. Peck, 67 *Ill.*, 98. (Assumpsit on note. Plea that note was given on a partial settlement with verbal promise that payee would hold until final settlement, and claiming larger sum due from payee as set-off against note. *Held*, demurrer to plea that it attempted to vary a written contract by showing a different verbal agreement at the same time, properly sustained.)

Greig vs. Russell, 115 *Ill.*, 483; s. c., 2 *West. Rep.*, 824, 826. (Bill to redeem from a deed as being by mutual agreement a mortgage.)

Carr vs. Hays, 110 *Ind.*, 408; s. c., 9 *West. Rep.*, 183, 185; 11 *North East. Rep.*, 25.

Draper vs. Snow, 20 *N. Y.*, 331, 332. (Action on guaranty: complaint alleging the contract and the guaranty, and that they were executed at the same time. *Dictum* that if the statute of frauds would not allow this to be shown by extrinsic evidence, demurrer would lie.)

s. p., *Hastings vs. White*, 24 *Ark.*, 269; *Solary vs. Stultz*, 22 *Fla.*, 263; *Booske vs. Gulf Ice Co.*, 24 *Fla.*, 551; s. c., 5 *South. Rep.*, 247; *Cairo vs. Parker*, 84 *Ill.*, 613; *Fort Scott Coal Co. vs. Sweeney*, 15 *Kans.*, 244.

Hunter vs. McHose, 100 *Pa. St.*, 38.

Wright vs. Hays, 34 *Tex.*, 253.

[*Contra*, *Vinal vs. Continental Constr. Co.*, 53 *Hun (N. Y.)*, 247, 251 (LEARNED, P. J.); and *Tarver vs. Garlington*, 27 *So. Car.*, 107; s. c., 2 *South East. Rep.*, 846 (SIMPSON, C. J.). (In these cases the Court say that the allegation of the fact to be proved by oral evidence ought to be deemed admitted by the demurrer; and that *non constat* but what objection to oral evidence may be waived on the trial.)]

A collateral stipulation, even if oral, may be pleaded. See *Van Brunt vs. Day*, 8 *Abb. N. C.*, 336; s. c., 81 *N. Y.*, 251.

² *N. Y. Trust & L. Co. vs. Helmer*, 12 *Hun*, 35; *aff'd* in 77 *N. Y.*, 64, concurring in this point. (The Supreme Court, per DANIELS, J., conceding that if the pleading showed a mere verbal agreement it would be bad, say that a party is not required to plead his evidence.)

Weller vs. Hersee, 10 *Hun (N. Y.)*, 431.

[*Contra*, *Carr vs. Hays*, 110 *Ind.*, 408; s. c., 9 *West.*, 183, 185; 11 *North East. Rep.*, 25; and *Indiana cases cited.*]

§ 178. *Usage or custom to aid.*—Where extrinsic evi-

dence of usage or custom is necessary to make out a cause of action on the contract alleged, the usage or custom must be pleaded, as affecting the contract.

Lindley vs. Waterloo First Nat. Bank, 76 *Iowa*, 629; s. c., 2 *L. R. A.*, 709; 41 *North West.*, 381. (Custom of banks to pay exchange in addition to face of paper.)

Pullan vs. Cockran (*Ham. Co. Dist. Ct., O.*), 6 *Weekly Cin. L. Bul.*, 390. (Custom of plaintiff's business to require pay in advance. Petition bad for not alleging that the contract had anything to do with the custom.)

Roebbling vs. Tiffany, *N. Y. Daily Reg.*, May 9, 1884. (Complaint by consignee against consignor for neglecting to mark goods of the latter with value, etc., so as to charge carrier with value on loss; bad for not alleging that it was part of the proper sending, etc., to do so.)

[*Compare contra*, *Whitehouse vs. Moore*, cited on p. 48, under § 52.]

E. *Performance of Conditions.*

[For the rules as to defendant's plea of performance on his part, see also DEMURRER TO ANSWER.]

§ 179. *Performance by plaintiff.*—If by the contract sued on, either by express provision or by necessary implication, something was to be done as a condition precedent to what defendant agreed to do, the complaint is demurrable if it does not allege the performance of the condition¹ or facts constituting an excuse for non-performance.²

¹ *Hart vs. Rose*, *Hempst. (U. S. C. Ct.)*, 238. (Under contract for delivery at specified places delivery at those places must be alleged.)

United States vs. Beard, 5 *McLean (U. S.)*, 441. (Under a contract to build a wall, the dimensions of which were dependent upon grading to be done by the plaintiff, alleging that the grading had been done is essential.)

Rogers vs. Cody, 8 *Cal.*, 324. (Complaint on notes, as it alleged a collateral agreement imposing a condition, was bad for not alleging performance of the condition.)

Ripley County *vs.* Hill, (*Ind.*, 1888); s. c., 13 *West. Rep.*, 774, 16 *North East. Rep.*, 156. (Bond for performance of construction contract.)

Fry's Exrs. *vs.* Lexington & B. S. R. Co., 2 *Metc. (Ky.)*, 314, 324. (Action on stock subscription: objection fatal on appeal, even when not taken below.)

Portage Canal, etc., Co. *vs.* Crittenden, 17 *Ohio*, 436. (Where condition involves compliance with another instrument the latter must be pleaded.)

Pope *vs.* Terre Haute Car & Manuf'g Co., 107 *N. Y.*, 61; s. c., 13 *North East.*, 592. (Under contract not specifying time for delivery, allegation of delivery within a reasonable time essential.)

Relyea *vs.* Drew, 1 *Den. (N. Y.)*, 561. (Amount of compensation sued for being dependent on earnings, facts on which it depended must be alleged.)

Oakley *vs.* Morton, 11 *N. Y.*, 25, 30. (Judgment on verdict directed by trial judge reversed for error in disregarding failure to show performance of condition precedent.)

Wilson *vs.* Lyle (*Pa.*), 23 *W. N. C.*, 309; 16 *Atl. Rep.*, 861. (Averment of substantial performance, or of readiness and an offer to perform, necessary.)

² Allegations showing performance, satisfactory to defendant, up to the time when defendant defaulted in payments under the contract, as shown by the facts alleged, *held* enough. Phillips, etc., *Constr. Co. vs.* Seymour, 91 *U. S.*, 646.

Butterworth *vs.* Kinsey, 14 *Tex.*, 495. (Allegation of a waiver, being equivalent to performance, supplies the place of an averment of performance.)

See also § 190.

§ 180 — *exception or proviso*.—In pleading the performance or happening of a condition precedent, it is not necessary to show compliance with an exception or proviso to such condition contained in a separate clause.

Otherwise if contained in the general clause.

Freeman *vs.* Travellers' Ins. Co., 144 *Mass.*, 572, and cases cited.

Compare Hammer *vs.* Kaufman, 2 *Bond*, 1. (Bond by the buyer of a secret process to pay price, conditioned with a proviso that he could discontinue its use at a specified time if, etc. *Held*, not necessary for obligee to allege that obligor had used it after that time.)

§ 181. — *conditions not alleged*.—Conditions not appearing in the instrument pleaded, or in the allegations of its legal effect, as the case may be, even though usual in all instruments of that class, will not be considered on demurrer.

Bank of River Falls *vs.* German Am. Ins. Co., 72 *Wisc.*, 535. (Fire policy.)

Gold *vs.* Sun Ins. Co., 73 *Cal.*, 216; s. c., 14 *Pacif. Rep.*, 786. (In an action for breach of contract to renew a fire policy, it will not be presumed that the original policy contained any conditions the breach of which would defeat plaintiff's cause of action.)

Smith's Adm'r *vs.* Lloyd's Ex'x, 16 *Gratt. (Va.)*, 295. (Action on bond, which when produced on oyer showed conditions not intelligible without extraneous facts.)

s. p., Smith *vs.* Wiswall, 2 *Hall*, 469.

In Ellis *vs.* Sharp, 42 *Hun (N. Y.)*, 179, a common-school teacher's complaint for wages, with a general allegation of having entered upon the employment and taught the school for the period, *held*, sufficient without alleging performance of other statutory duties, such as keeping records, etc.

§ 182. *Form of allegation at common law*.—In the absence of statute, if the contract is pleaded, and specifies explicitly the acts to be performed, then an allegation of performance of the specified acts, following the language of the contract, is sufficient;¹ and even a general allegation that he performed all the acts and conditions specified in the instrument.²

If the language of the contract is not pleaded, or does not specify the acts to be done, a general allegation of performance of all that plaintiff was bound to do, or in any equivalent terms, is a mere conclusion, and bad on general demurrer.³

¹ Smith *vs.* Lloyd, 16 *Gratt. (Va.)*, 295, 313. (So holding since special demurrers are abolished in Virginia.)

² Kern *vs.* Zeigler, 13 *W. Va.*, 707, 714.

[*Contra*, Washington *vs.* Ogden, 1 *Black*, 450; s. c., 17 *Law ed.*, 203. (Contract by which vendor stipulated "to

made a deed." *Held*, insufficient to allege readiness to deliver a deed without alleging good title. GRIER, J., says it is not sufficient to pursue the words if the intent be not performed.])

[But this was after trial, on which it appeared that plaintiff was unable to perform.]

* *Averbeck vs. Hull*, 14 *Bush* (Ky.), 505. (Agreement to dismiss certain actions, and to "use every legal and proper endeavor to have dismissed" certain criminal prosecutions. General allegation that "he did these things" bad on general demurrer.)

Read vs. Cisney, 4 *Litt.* (Ky.), 137. (Allegation that he had done all he was bound to do, except when prevented by defendant.)

Gouverneur vs. Tillotson, 3 *Edw. Ch.* (N. Y.), 348, 352. (In chancery. Bill not showing particularly the acts performed, so that the Court might judge of their sufficiency, bad.)

[*Contra*, *Smith vs. Wiswall*, 2 *Hall* (N. Y.), 469.]

[*Contra* also now in England. *Bentley vs. Dawes*, 9 *Exch.*, 666; *Rust vs. Nottidge*, 1 *Q. B.*, 99.]

[For other cases see *Commercial Union Assur. Co. vs. State ex rel. Smith* (Ind., 1888), 15 *North East. Rep.*, 518; *Ellsworth vs. Buell*, 4 *Ind.*, 555; *Home Ins. Co. of N. Y. vs. Duke*, 43 *id.*, 418; *Glover vs. Tuck*, 24 *Wend.* (N. Y.), 153.]

§ 183. *Statutes sanctioning general allegation that he duly performed.*—Statutes exist in a number of the States to the effect that in pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, thus modifying the common-law rule.

[See also "DULY," § 255, below.]

Arizona—Rev. Stat. (1887), ¶ 662. "In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall establish on the trial the facts showing such performance."

Arkansas—*Mansfield's Digest*, § 5068. "In pleading the performance of a condition precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such an allegation is not controverted as stated in the last section in regard to judgments" [i.e., controverted in the answer to a complaint, or in reply to a counterclaim or set-off], "it shall not be necessary to prove it on trial."

California—*Code Civ. Pro.*, § 457. (Same as Arizona, above, except "must establish" instead of "shall establish," and "conditions" instead of "condition," and different punctuation.)

Colorado—*Code Civ. Pro.*, § 66. (Same as Arizona, above, except "conditions" instead of "condition," and different punctuation.)

Florida—*McClellan's Dig.* (1881), p. 826, § 59. "It shall be lawful for the plaintiff or defendant in any action to aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent the performance of which he intends to contest."

Idaho—*Rev. Stat.* (1887), § 4212. (Same as Arizona, above, except "must establish" instead of "shall establish," "conditions" instead of "condition," and different punctuation.)

Indiana—*Civ. Pro. Rev. Stat.* (1888), § 370. "In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part. If the allegation be denied, the facts showing a performance must be proved on the trial."

Iowa—*Code* (1888), § 2715; *McClellan's Anno. Code*, § 3922. "In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state, generally, that he duly performed all the conditions on his part."

Code, § 2717; *McClellan's Anno. Code*, § 3924. "If either of the allegations contemplated in the three preceding sections is controverted, it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specially stated."

Kansas—*Comp. L.* (1885), § 3921; *Gen. Stat.* (1889), § 4205. "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the

party duly performed all the conditions on his part; and if such allegations be controverted, the party pleading must establish, on the trial, the facts showing such performance."

Massachusetts—*Pub. Stat.* (1882), p. 965, c. 167, § 2, cl. 10.

"When a bond, or other conditional obligation, contract, or grant, is declared on, the condition shall be deemed part of the obligation, contract, or grant, and shall be set forth; breaches relied on shall be assigned; and conditions precedent to the right of the party relying thereon shall be averred to have been performed, or his excuse for the non-performance thereof stated."

p. 967, c. 167, § 23. "When a conditional obligation, contract, or grant is relied on in an answer or subsequent allegation, the condition shall be deemed a part of the instrument, and similar averments shall be required in pleading on the same as are required by the tenth clause of section two."

Minnesota—1 *Gen. Stat.*, p. 722, c. 66, § 109. Same as Arizona, above, except instead of "shall establish on the trial" the Minn. statute reads "is bound to establish," etc., "conditions" instead of "condition," and different punctuation.

Mississippi—*Rev. Code* (1880), § 1574. "In pleading the performance of conditions precedent, the plaintiff or defendant may aver generally that he duly performed all the conditions on his part, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition precedent the performance of which he intends to contest."

Missouri—*Code Civ. Pro., Rev. Stats.* (1889), § 2079. (Same as Arizona, above, except "shall be bound to establish" instead of "shall establish.")

Montana—*Comp. Stat.* (1887), p. 86, § 104. (Same as Arizona, above, except "conditions" for "condition.")

Nebraska—*Code Civ. Pro.*, § 128; *Comp. Stat.* (1887), p. 757. (Same as Kansas, above, except "allegation" for "allegations.")

Nevada—*Gen. Stat.* (1885), § 3082. (Same as Arizona, above, except "conditions" instead of "condition," and different punctuation.)

New Jersey—*Revis.* (1877), p. 868, § 126. "The plaintiff or defendant in any action may aver performance of conditions precedent generally; and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition precedent the performance of which he intends to contest."

New York—Code Civ. Pro., § 533. "In pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance; but the party may state, generally, that he, or the person whom he represents, duly performed all the conditions on his part. If that allegation is controverted, he must, on the trial, establish performance."

[The corresponding provision in the original *Code Pro.*, § 162, was substantially the same as Arizona, above.]

North Carolina—Code, § 263; *Code Civ. Pro.*, § 122. (Same as Arizona, above, except "conditions" for "condition," and "shall be bound to establish" instead of "shall establish.")

North Dakota—Comp. Laws (1887), § 4927. (Same as Arizona above, except "conditions" instead of "condition," "allegations" instead of "allegation," "shall be bound to establish" instead of "shall establish.")

Ohio—Rev. Stat. (1890), § 5091. (Same as Kansas, above, except "allegation" instead of "allegations.")

Oregon—Code Civ. Pro., § 87. (Same as Arizona, above, except "shall be bound to establish" instead of "shall establish," "conditions" instead of "condition," and different punctuation.)

South Carolina—Code Civ. Pro., § 183, *Gen. Stats.* (1882). (Same as Arizona, above, except "conditions" instead of "condition," and "shall be bound to establish" instead of "shall establish.")

South Dakota—Comp. Laws (1887), § 4927. (Same as Arizona, above, except "conditions" instead of "condition," "allegations" instead of "allegation," "shall be bound to establish" instead of "shall establish.")

Utah—Comp. Laws (1888), § 3243. (Same as Arizona, above, except "conditions" for "condition," and "must establish" instead of "shall establish.")

Washington—Code (1881), § 97. (Same as Arizona, above, except "conditions" instead of "condition," and "shall be bound to establish" instead of "shall establish.")

Wisconsin—Annot. Stat. (1889), § 2674. (Same as Arizona, above, except "shall be bound to establish" instead of "shall establish," and "conditions" instead of "condition.")

Wyoming—Rev. Stat. (1887), § 2478. (Same as Kansas, above.)

§ 184. *What are "conditions" within the statute.*—The statutory general allegation of performance of con-

ditions precedent in a contract covers the making of a necessary demand or notice by the party before suit¹ (including, in insurance cases, the furnishing of proofs of loss,² and the procuring of a notary's or magistrate's certificate³), and the non-occurrence of any breach on the part of the party claimant.⁴

This short form of pleading is applicable to statutory conditions which have been engrafted on a contract of public officers,⁵ but not to other statutory conditions whatever the cause of action.

¹ *Case vs. Phenix Bridge Co.*, 55 *N. Y. Super. Ct. (J. & S.)*, 25. (Notice that the state of the work required performance.)

Scheiderer vs. Travelers' Ins. Co., 58 *Wisc.*, 13. (Notice of accident against which plaintiff was insured.)

² *Commercial Union Assur. Co. vs. State ex rel. Smith*, 113 *Ind.*, 331; s. c., 15 *North East Rep.*, 518.

Boardman vs. Westchester Fire Ins. Co., 54 *Wisc.*, 364.

Schobacher vs. Germantown F. M. Ins. Co., 59 *Wisc.*, 86.

³ *Ferrer vs. Home Mut. Ins. Co.*, 47 *Cal.*, 416.

⁴ *National Ben. Asso. vs. Bowman*, 110 *Ind.*, 355; s. c., 9 *West. Rep.*, 186; 11 *North East Rep.*, 316. (Holding that the allegation effectually negatives any violation of conditions precedent contained therein, or that the injury had occurred outside the limits of the risk.)

Commissioners of Vermillion County vs. Hammond (*Ind.*, 1882), 8 *Weekly Cinn. L. Bull.*, 55. (Non-acceptance of a commission, the acceptance of which was forbidden by the contract.)

Whether the stipulation against the bringing of an action before the required period has elapsed, after presentation or demand, is a condition precedent within the meaning of the contract, seems unsettled. There are three views: (1) it is a condition precedent, (2) it is a condition subsequent, (3) it goes to the time of performance, and the real objection is only that the action is premature. Compare *Doyle vs. Phoenix Ins. Co.*, 44 *Cal.*, 264; *Gay vs. Hartford Fire Ins. Co.*, 1 *Blatchf. C. Ct.*, 280; *Wilson vs. Aetna Ins. Co.*, 27 *Vt.*, 99; *German-American Ins. Co. vs. Etherton*, 25 *Neb.*, 505; *Home Ins. Co. vs. Lindley*, 26 *Ohio St.*, 348. In *Carberry vs. German Ins. Co.*, 51 *Wisc.*, 605, the Court

say that waiting the period required by the policy is not a condition precedent.

- * *White Pine County vs. Herrick*, 19 *Nev.*, 34; s. c., 5 *Pacif. Rep.*, 276.

An uncertainty in the contract will sustain a motion to make the complaint thereon more definite in its allegation of performance, notwithstanding this statute. *William vs. Hallett*, 2 *Sawy.*, 261.

§ 185. *Form of allegation under the statute.*—A general allegation in the words of the statute,¹ or substantially equivalent,² suffices.

An allegation which is not substantially equivalent is bad on demurrer, unless sufficient at common law.³

- ¹ *Griffiths vs. Henderson*, 49 *Cal.*, 566.
- Lowry vs. Megee*, 52 *Ind.*, 107.
- Vreeland vs. Beekman*, 7 *Vroom (N. J.)*, 13.
- Crawford vs. Satterfield*, 27 *Ohio St.*, 421.
- * *Moritz vs. Lavelle*, 77 *Cal.*, 10; s. c., 18 *Pacif. Rep.*, 803.
(Allegation that plaintiff has performed all and singular his agreements and covenants with defendant, sufficient.)
- Bertelson vs. Bower*, 81 *Ind.*, 512.
- Mason vs. Seitz*, 36 *Ind.*, 516. (Suit for rent under a lease. Allegation of the execution of the contract, etc., and that defendant was placed in possession, and still retains it, sufficient as to plaintiff's performance of conditions precedent.)
- White Pine County vs. Herrick*, 19 *Nev.*, 34; s. c., 5 *Pacif.*, 276. (Allegation that plaintiffs have "complied with all the requirements and conditions of the bond, and the requirement of all acts of the legislature pertaining to county officers, and to the official bonds of the county officers," sufficient.)
- Wood vs. Lilley* (HOFFMAN, J.), 1 *Bliss' Code (N. Y.)*, 400; 3d ed., 600. (Alleging that plaintiff "performed," without the word "duly" or any equivalent term, is sufficient.)
- Griffin vs. Pitman*, 8 *Oreg.*, 342. (Contract to dig a well, and insure water therein. Allegation that "the work was performed according to contract," sufficient.)
- Bank of River Falls vs. German Am. Ins. Co.*, 72 *Wisc.*, 535. (Allegation that the insured "fully complied with all the conditions of said contract, and rendered to said defendant a particular account and proof of said loss, as required by said contract," sufficient.)

Smith *vs.* Chicago & N. W. R. Co., 19 *Wisc.*, 326. (Allegation that plaintiff kept and performed all conditions necessary to entitle him to the stock in the corporation, sufficient.)

Hatch *vs.* Peet, 23 *Barb.*, 575. (Action on bond with condition for performance of various acts by third persons.)

McCreery *vs.* Duncan, 53 *N. Y. Super. Ct. (J. & S.)*, 448. (Reasonable interpretation.)

Cowper *vs.* Theal, 4 *N. Y. State Rep.*, 674; s. c., 26 *N. Y. Weekly Dig.*, 73. (Necessary implication.)

* Home Ins. Co. *vs.* Duke, 43 *Ind.*, 418. (Mere allegation that "though proof of said loss has been duly made and notice given, yet the said defendant has not made the plaintiff good in said loss," insufficient.)

Les Successeurs D'Arles *vs.* Freedman, 53 *N. Y. Super. Ct. (J. & S.)*, 518. (Allegation that he "in all respects carried out his agreement on his part," not good. It is necessary to plead substantially in the words of the statute.)

Phillips *vs.* Phillips, 14 *Ohio St.*, 308. (Allegation that the contract—an ante-nuptial contract—"has been a valid and subsisting contract ever since the date of its execution, and is still a valid and subsisting contract, and binding on the said" widow, bad.)

§ 186. *Performance by acts of third persons.*—It is the better opinion that the usual words of the statute, "the party duly performed," are not confined to a party to the action or the contract, but sanction an allegation in effect that the person upon whom performance of the condition devolved, duly performed.¹

But an allegation that the plaintiff duly performed does not import performance by a third person,² unless by express terms of the contract the plaintiff undertakes to procure the performance of such third person.³

¹ California Steam Nav. Co. *vs.* Wright, 6 *Cal.*, 258. (Performance by plaintiff's assignor.)

Rowland *vs.* Phalen, 1 *Bosw. (N. Y.)*, 43; and see Graham *vs.* Machado, 6 *Duer. (N. Y.)*, 514.

² Carroll *vs.* Girard Fire Ins. Co., 72 *Cal.*, 297; s. c., 13 *Pacif. Rep.*, 863. (Award to be made before suit.)

Johnson *vs.* Howard, 20 *Minn.*, 370. (Measurement to be made by government officer.)

* Rowland *vs.* Phalen, 1 *Bosw. (N. Y.)*, 43. (Stipulation by plaintiff to procure a third person to do a specified act.)

§ 187. *Acceptance of work.*—An allegation “that the defendant duly accepted the work performed by plaintiff under and by virtue of said agreement” is not sufficient on demurrer as an allegation that the entire work as performed was accepted as a full compliance with the requirements of the contract.

Schencke *vs.* Rowell, 3 *Abb. N. C. (N. Y.)*, 42. (So held under a building contract.)

S. P., Smith *vs.* Brown, 17 *Barb. (N. Y.)*, 43*

S. P., Myrick *vs.* Merritt, 22 *Fla.*, 335.

§ 188. *Mutual and dependent conditions.*—If, upon a proper construction of the contract, conditions are mutual and dependent,¹ so that the obligation of each party is conditioned on concurrent performance by the other, it not being certain that either is obliged to do the first act, the party seeking to recover for non-performance must allege that he was ready and willing, and (naming time and place²) offered to perform,³ or facts excusing lack of offer.

In ordinary contracts, such offer is sufficient without alleging a formal tender, if refusal be alleged.⁴

An allegation that he always has been ready and willing to, etc., but defendant, though often requested to, etc., hitherto has refused, and still does refuse is insufficient.⁵

In ordinary contracts, an allegation that at the time and place for performance he was ready and willing to perform is sufficient, if coupled with an allegation that defendant then and there refused to perform and has never performed,⁶ or that plaintiff was prevented from performing by specified conduct of defendant.⁷

An allegation that plaintiff was ready and willing to

perform, and then and there requested defendant to, etc., but defendant refused, is sufficient; for a demand implies the correlative offer.⁸

Under an ordinary executory contract of sale of *personal property*, the seller to deliver at a specified place (especially if it is the buyer's address) for payment "on delivery," the buyer need only allege that he was ready and willing (specifying time and place), and that the seller neglected and refused, etc.⁹

But the seller must allege delivery or tender.¹⁰

Under a contract requiring execution of a deed or similar instrument, and making delivery, and payment of price, concurrent acts, to be simultaneously performed, neither party can recover without alleging a tender. Alleging the purchaser's readiness, and willingness, and offer to accept and pay, is not enough.¹¹

⁸ Much of the apparent conflict in the cases results from the peculiar language of different contracts. This explains such exceptional cases as *Pomroy vs. Gold*, 43 *Mass.*, 500.

The cases make some modifications or peculiar applications of these principles in actions on covenants to convey real property.

A covenant which goes to only part of the consideration is not regarded as mutual and dependent. *Bennett vs. Pixley*, 7 *Johns. (N. Y.)*, 249; *Grant vs. Johnson*, 5 *N. Y.*, 247, rev'g 5 *Barb. (N. Y.)*, 161.

If the covenants on one side are for performance on a specified day, or days, which may happen before those on the other are to be performed (*Corich vs. Ingersoll*, 19 *Mass. (2 Pick.)*, 297; *Grant vs. Johnson*, above cited), or if those on the other side are of a continuous nature, not being a condition precedent,—they are not regarded as mutual and dependent within the rule. (*Hard vs. Seeley*, 47 *Barb. (N. Y.)*, 428, where the seller's covenant was, not to disclose the secret of the thing bought, and the buyer's was for payments on specified days.) [*Contra*, see *Gray vs. Hinton*, 2 *McCrary (U. S.)*, 167.]

¹⁰ *Pope vs. Terre Haute Car & Mfg. Co.*, 107 *N. Y.*, 61. (Failure of the seller to state that his tender was within a reasonable time, where the contract alleged

was silent as to time, fatal. Error to refuse to dismiss at the trial.)

Neis vs. Yocum, 16 *Fed. Rep.*, 168. (DEADY, J. Here the goods were to be delivered on demand. *Held*, that the buyer's allegation that he was ready and willing to receive, and had offered to receive and pay, and had demanded, etc., and defendant, though often requested, refused, etc., without stating time, was sufficient under the Code: although it would have been bad on special demurrer at common law. But he adds: "Doubtless there are cases in which the time wherein an act was done or occurred is material, and a statement of the fact without the time would not constitute a cause of action, nor an element of one.") [Cited in 24 *id.*, 107.]
s. p., as to contract to deliver on request, *Robinson vs. Tyson*, 46 *Pa. St.*, 286.

[According to *Patterson vs. Jones*, 13 *Ark.*, 69; s. c., 56 *Am. Dec.*, 296, if no place is specified, the law fixes the place, and the party at whose residence or in whose presence the law thus fixes it, need not allege demand or notice. Compare the case of a marriage promise, where, the place not being fixed, notice of readiness may be required—*Seymour vs. Gartside*, 2 *D. & R.*, 55.]

An allegation that he was "at all times" ready at the place specified, is equivalent to an allegation that he was ready there on the day specified. *Porter vs. Rose*, 12 *Johns. (N. Y.)*, 208.

* *Lester vs. Jewett*, 11 *N. Y.*, 453, rev'g 12 *Barb.*, 502 (leading *N. Y.* case, reviewing conflicting cases).

Heine vs. Treadwell, 72 *Cal.*, 217; s. c., 13 *Pacif. Rep.*, 503. (Allegation by purchaser that he has been ready and willing, not sufficient without allegation of tender. [Citing 15 *Wend.*, 637; 6 *id.*, 27; and *Strong vs. Blake*, 46 *Barb.*, 227.])

Dunham vs. Pettee, 8 *N. Y.*, 513. (Under an executory sale, seller must not only allege that he was ready and willing, but also that he offered to deliver within the time fixed.)

Considerant vs. Brisbane, 14 *How. Pr. (N. Y.)*, 487. (Written instrument by which defendant promised to pay the plaintiff \$5,000, adding, "for which I am to receive" specified stock. *Held*, necessary to allege that the stock was delivered, or that there was an offer to deliver, on the day fixed for payment.)

* *Lester vs. Jewett*, 11 *N. Y.*, 453. (The allegation in the count sustained was in effect that plaintiff at the specified time and place "was ready and willing and offered to defendant to," etc., for etc., "yet said defendant did

not at [that time] nor at any time, although often requested to do so, purchase.")

* *Lester vs. Jewett* (above cited).

s. p., *Kern vs. Zeigler*, 13 *W. Va.*, 707, 716.

Smith vs. Wright, 4 *Abb. Ct. App. Dec.* (N. Y.), 274.

(On an executory sale, payment and delivery being concurrent acts, a general allegation by the buyer that he was ready and willing to accept and pay, and that defendant neglected and refused, is not enough.)

[*Dictum* that it is not enough for either party.] To same effect *Fickett vs. Brice*, 22 *How. Pr.* (N. Y.), 194.

* *Smith vs. Lewis*, 26 *Conn.*, 110, 118.

* *Kern vs. Zeigler*, 13 *W. Va.*, 707, 716. (Allegation by vendor of real property that he was ready and willing, but was prevented by failure of the defendant to be there on that day, and that defendant was on that day absent from the State and was, etc., in the State of, etc., sufficient.) [And see 25 *Wend.*, 404.]

s. p., *Woolner vs. Hill*, 93 *N. Y.*, 576, 580. (Seller of goods had made an assignment for benefit of creditors, before time for performance arrived.)

* *Tinney vs. Ashley*, 32 *Mass.* (15 *Pick.*), 546, 552. "Certainly sufficient in an action in a court of equity to enforce specific performance." *St. Paul, Div. No. 1, vs. Brown*, 9 *Minn.*, 157, 164.

* *White vs. Demilt*, 2 *Hall* (N. Y.), 405. (OAKLEY, C. J. Allegation by buyer, under contract to give his notes for the price, that a reasonable time called for by the contract had elapsed; that plaintiff had always been ready and willing to accept, receive and pay for said goods in manner aforesaid, and that defendant had refused to deliver the same,—*held*, sufficient on general demurrer.)

s. p., *Coonley vs. Anderson*, 1 *Hill* (N. Y.), 519. (Allegation of contract to sell, etc., to be delivered to plaintiff at, etc., by a day named, to be paid for by plaintiff "on delivery;" that plaintiff had always been ready and willing to accept and pay, etc., but defendant did not deliver. *Held*, that [plaintiff being a merchant having a store at the place specified] it was error to nonsuit for want of a tender, or offer, in defendant's absence.)

¹⁰ *Davenport vs. Wheeler*, 7 *Cow.*, 231.

¹¹ *Englander vs. Rogers*, 41 *Cal.*, 420.

§ 189. *Conditions subsequent*.—Performance of condi-

tions subsequent need not be alleged,¹ even though expressed in the contract in the form of an exception or proviso.²

¹ *Redman vs. Ætna Ins. Co.*, 49 *Wisc.*, 431, 438.

There has been much difference of opinion as to the application of this rule to representations and warrantees in insurance.

² 1 *Chitt. Pl.*, 16 *Am. ed.*, 246.

Griswold vs. Scott, 13 *Ga.*, 210.

Cox vs. Plough, 69 *Ind.*, 311.

Wheeler vs. Bavidge, 9 *Exch.*, 668, the usual exception in the body of a charter-party, as to act of God, etc., it was held need not be negatived by plaintiff; but was to be set up by defendant.

§ 190. *Excuses for non-performance of conditions.*—An allegation that defendant, before the time for plaintiff to perform a condition precedent arrived, communicated to plaintiff his refusal to perform the contract on his part, dispenses with an allegation of offer or tender of performance of the condition precedent.¹

But it does not dispense with an allegation that plaintiff was ready and willing to perform such condition,² or at least that he would have been had he not been prevented from making ready by such notice.³

A general allegation that defendant had disabled himself from performing, and had prevented plaintiff from performing, without stating the acts done, is not enough to dispense with alleging such offer or tender, as would otherwise be required.⁴

But an allegation that he had conveyed to a stranger the property he had agreed to convey to plaintiff is enough.⁵

Alleging defendant's failure to perform an independent stipulation is not an excuse for plaintiff's failure to perform.⁶

¹ *McPherson vs. Walker*, 40 *Ill.*, 371. (Buyer's anticipatory refusal to accept, excuses omission to tender.)

Shaw vs. Republic Life Ins. Co., 69 *N. Y.*, 286, 293, modifying 67 *Barb.*, 586. (Communicated intent not to perform, not withdrawn, before time for performance of condition by plaintiff exonerates plaintiff and dispenses with his offering to perform condition precedent. The rule is the same in case of many successive conditions, such as payment of premiums in life insurance.)

Jones vs. Powell, 15 *Ala.*, 824.

s. p., *Porter vs. Rose*, 12 *Johns.* (*N. Y.*), 209.

² *Clarke vs. Crandall*, 27 *Barb.* (*N. Y.*), 73.

⁴ *Denny vs. Denny*, 90 *Mass.* (8 *Allen*), 309.

Nor is an allegation of performance by the plaintiff "except wherein the same were afterwards waived and altered from said written agreement by the direction, consent or negligence, and the fault of the said defendants." *Smith vs. Brown*, 17 *Barb.*, 431.

s. p., § 187, note.

s. p., *Wilson vs. Tucker*, 9 *R. I.*, 137.

[*Compare Little vs. Mercer*, 9 *Mo.*, 218.]

⁶ *Newcomb vs. Brackett*, 16 *Mass.*, 161.

⁶ *Bogardus vs. N. Y. Life Ins Co.*, 101 *N. Y.*, 328.

F. Breach.

§ 191. *Necessity of allegation,—on money contracts.—*

In an action on a contract for the payment of money only, such as negotiable paper or a bond conditioned only for the payment of money, if the money is shown by the complaint to have become due and payable, an allegation of non-payment is not necessary; a general allegation substantially to the effect that the same has not been paid, although the defendant has been often requested to pay it, is enough.¹

It is the better opinion that not even such an allegation is necessary; because plaintiff is not required to prove non-payment.²

¹ *Keteltas vs. Myers*, 19 *N. Y.*, 231, rev'g 1 *Abb. Pr.*, 403; *s. c.*, 3 *E. D. Smith*, 83.

Clute vs. McCrea, 12 *N. Y. State Rep.*, 647. (Loan.)

¹ *Salisbury vs. Stinson*, 10 *Hun* (N. Y.), 242. (So holding even of a complaint for goods sold; the theory of the decision being that plaintiff, having proved the sale and promise to pay, is not bound to prove demand or non-payment, and therefore need not allege it.)

But it is the uniform practice to insert a general allegation of non-payment.

[*Contra*, *Scroufe vs. Clay*, 71 *Cal.*, 123; s. c., 11 *Pacif. Rep.*, 882. (Note: allegation of refusal to pay, and sum now due, not enough.) *Richards vs. Travellers' Ins. Co.*, 80 *Cal.*, 505; s. c., 22 *Pacif. Rep.*, 939. (Insurance policy: omission to allege non-payment fatal even after verdict.)]

§ 192. — *in other actions*.—In actions other than those on contracts for the payment of money only,—such as a bond conditioned for any other matter than the payment of money by the obligor alone,¹ or an assumption clause contained in a conveyance subject to the payment of a mortgage,²—the complaint is insufficient unless it alleges a breach.

¹ *Kamping vs. Horan*, 21 *N. Y. State Rep.*, 418; s. c., 4 *N. Y. Supp.*, 51.

² *Krower vs. Reynolds*, 99 *N. Y.*, 245, rev'g 19 *Weekly Dig.*, 383.

§ 193. *General allegation*.—A general allegation that the defendant has not performed his contract sued on is insufficient on demurrer.¹

So also as against a surety, an allegation that his principal has not performed is insufficient.²

¹ *Hart vs. Bludworth*, 49 *Ala.*, 218. ("Defendants have failed and refused to comply with their" contract alleged.)

Smythe vs. Scott, 106 *Ind.*, 245; s. c., 6 *North East. Rep.*, 145, 147. (Action against indorser of note: words "wherefore a cause of action hath accrued" do not import non-payment by maker.)

Wilson vs. Clarke, 20 *Minn.*, 367. (Allegation that defendant neglected to do the specified acts "according to the terms of said agreement," bad, as a mere conclusion of law.)

Whitehill vs. Shickle, 43 Mo., 537. (Allegation that he "totally disregarded all, and did not fulfil any of the covenants and stipulations to be kept and performed, and made by him in the written instrument," bad.)

Schenck vs. Naylor, 2 *Duer* (N. Y.), 675. (Covenant not to let or allow to be underlet, etc., for specified purposes. Allegation that the premises were occupied for such purposes "in violation of defendant's agreement," bad.)

* *Van Schaick vs. Winne*, 16 *Barb.* (N. Y.), 95.

Supervisors vs. Semler, 41 *Wisc.*, 374. (Action on official bond: allegation that officer is a defaulter not equivalent to averring failure to pay over on demand.)

§ 194. *Allegation in terms of contract.*—An allegation of a breach is sufficient if expressed by negating the terms of the contract¹ as pleaded, or in language which is equally specific and substantially the same in meaning.²

If the contract was to pay upon a condition which imports the obligation of the contracting party to use diligence,—as in the case of a contract to pay money when collected,—it is sufficient to allege that he did not use such diligence without stating in what respect he had failed to do so.³

¹ *Sannes vs. Ross* (*Ind.*, 1886), 5 *N. East. Rep.*, 699. (Undertaking on the issue of attachment. Allegation that the attachment proceeding was disposed of against the appellee at the September term, 1883, of the Benton Circuit Court, and that there was a breach in the undertaking, in that the plaintiff did not duly prosecute his proceedings in attachment, and that they were wrongful and oppressive,—*held* sufficient as at common law.)

Marston vs. Hobbs, 2 *Mass.*, 433; *Bacon vs. Lincoln*, 58 *id.* (4 *Cush.*), 210. (Covenant.)

Craghill vs. Page, 2 *N. H.*, 446. (Bond with collateral condition.)

Bostwick vs. Van Voorhis, 91 *N. Y.*, 353. (Bond of bank cashier: *Held* that omission to comply with statute as to assigning breaches is not ground for dismissal. Motion to make more definite is the remedy.)

Smith vs. Jansen, 8 *Johns.* (N. Y.), 111. (Bond for liberties.) *Hughes vs. Smith*, 5 *id.*, 168. (Deputy's bond to sheriff.)

Johnstone vs. Meriwether, 3 *Call. (Va.)*, 524. (On bond with two conditions, an allegation that neither was performed, good. Dictum that if only one of two disjunctive conditions had been broken, a declaration assigning breach conjunctively would be bad.)

¹ *Fletcher vs. Peck*, 6 *Cranch (U. S.)*, 87, 127. (Covenant "that the legislature had a right to convey;" breach assigned "that the legislature had no authority to convey,"—good.)

Wilcox vs. Cohn, 5 *Blatchf. (C. Ct.)*, 346. (Breach of covenant in patent license.)

Potter vs. Bacon, 2 *Wend. (N. Y.)*, 583. (Holding that on an obscure covenant, an allegation of breach, according to the substance and the legal effect, though not according to the letter, was enough.)

Gliddon vs. McKinstry, 25 *Ala.*, 246.

s. p., *White vs. Snell*, 9 *Pick. (Mass.)*, 16.

Ellis vs. Sharp, 42 *Hun (N. Y.)*, 179. (Allegation that the school trustee "has neglected and refused to pay," held, equivalent to an averment that he had refused to give a warrant upon the supervisor, and of a refusal to collect by tax of the district.)

§ 195. *Exception or proviso*.—In alleging the breach, it is not necessary to negative an exception or proviso, contained in a separate clause from the stipulation broken, by which performance might have been waived or the obligation avoided.

Brown vs. Com. Fire Ins. Co., 86 *Ala.*, 189; s. c., 5 *South. Rep.*, 500. (Insurance policy.)

Stearns vs. Barrett, 18 *Mass. (1 Pick.)*, 443. (Breach of agreement by licensee not to make, outside of his district. Not necessary to allege that he had not taken advantage of another clause under which he might have secured the right.)

§ 196. *Several parties indebted*.—Where an allegation of non-payment is necessary, if all those that are liable on the cause of action stated are made defendants, an allegation that the defendants have not paid is sufficient without negating payment by any other persons.¹

If they are not all made defendants, an allegation that

the defendants have not paid² is not sufficient; but a general allegation that the sum has not been paid is sufficient.³

So if all those legally entitled to demand payment are joined as plaintiffs, an allegation of refusal to pay plaintiffs is sufficient; and should payment to a principal, to cestui qui trust, or to a third person for whose benefit the contract was made, be a performance, it is for the defendant to allege and prove it.⁴

If the contract is for performance by a person and his assigns, etc., or to a person and his assigns, etc., and the action is by or against assignee, executor, heir, administrator, etc., an allegation of non-performance by such defendant, or to such plaintiff, as the case may be, is not enough without negating performance by or to the representative.⁵

¹ *Hibbard vs. McKindley*, 28 Ill., 240. ("Said defendants have not paid" is sufficient; for a performance by one is a performance by all.)

Gray vs. Supreme Lodge, Knights of Honor, 118 Ind., 293; s. c., 20 N. East., 833. (Action on a benefit certificate. Answer that the decedent did not pay his assessments sufficiently avers that they were not paid.)

Even though the covenant be by defendant for himself and his assigns; for assignment will not be presumed. 1 Chitt. Pl., 16 Am. ed., 344*, citing *Gyse vs. Ellis*, 1 Stra., 228.

Van Demark vs. Van Demark, 13 How. Pr. (N. Y.), 372, 374. (An allegation, in an action for contribution, that no part had been paid to the plaintiff by the defendant, is not an admission that any part had been paid by a co-surety. So held, denying motion to make more definite and certain.)

^{*} *Robins vs. Pope*, *Hempst.* (U. S. C. Ct.), 219. (Reversing for error in this respect.)

^{*} *Van Rensselaer vs. Bradley*, 3 Den. (N. Y.), 135. (Covenant for rent against an assignee of the lease: allegation that a specified amount for a specified time "had accrued and become due and was in arrear," held, sufficient without alleging that the lessee had not paid it.)

To same effect *Dubois vs. Van Orden*, 6 *Johns. (N. Y.)*, 105.

⁴ *Rowland vs. Phalen*, 1 *Bosw. (N. Y.)*, 43.

⁵ 1 *Chitt. on Pl.*, 16 *Am. ed.*, 344*.

§ 197. *Disabling one's self: Anticipatory refusal.*—An action commenced before the time for defendant's performance had arrived may be maintained on allegations showing acts on his part which have rendered performance impossible.¹

To sustain an action commenced before the time for breach has arrived, on the ground of an anticipatory refusal to perform,² it must appear from the allegations that defendant communicated his refusal to plaintiff,³ and that plaintiff acted thereon.⁴

¹ *Lee vs. Pennington*, 7 *Bradw. (Ill.)*, 247. (Action on trustee's bond to pay interest during life of a third person and then distribute, sustainable after his embezzlement of the fund, insolvency, and death, without awaiting the termination of the life referred to.) [And see 69 *N. Y.*, 286, 293.]

² *Hochster vs. De Latour*, 2 *Ellis & B.*, 678; s. c., 20 *Eng. L. & Eq.*, 157 (leading English case).

Burtis vs. Thompson, 42 *N. Y.*, 246. (Marriage promise.)

Howard vs. Daly, 61 *N. Y.*, 362, 378; s. c., 19 *Am. R.*, 285. (Action for refusal to receive into employment said to lie before time for commencing service.)

Fox vs. Kitton, 19 *Ill.*, 519, 533. (Replevin sustained by mortgagee of vessel, upon the mortgagor announcing that he would not employ the vessel in the manner he had agreed, the announcement being acted on by plaintiff.)

Schoonover vs. Christy, 20 *Ill.*, 426. (Refusal to let plaintiff make up for lost time by work gives right to abandon contract and sue for quantum meruit.)

³ *Traver vs. Halsted*, 23 *Wend. (N. Y.)*, 66.

⁴ *Gray vs. Green*, 9 *Hun (N. Y.)*, 334 [followed in *Putnam vs. Griffin*, 19 *Weekly Dig.*, 46].

[Although this is the general rule, it is the better opinion that it is not necessary in all cases to show that plaintiff acted thereon otherwise than by bringing an action. Plaintiff is held to elect whether to treat the communication as a breach or not. It is a question of election.]

G. *Instruments for Payment of Money only.*

§ 198. *What are within the statute.*—The statutes existing in several of the States,¹ allowing instruments for the payment of money only to be pleaded by giving a copy and alleging what is due, etc., are construed as applying to instruments which raise an implied promise to pay,² as well as to those which contain an express promise.³

But they do not apply to conditional obligations,⁴ nor to a mortgage pleaded in foreclosure,⁵ nor to judgments or transcripts of judgments,⁶ nor to municipal assessments.⁷

¹ For these statutes see the last note to this section.

² *Burke vs. Ashley*, 12 *Hun* (N. Y.), 637. (Acknowledgment of indebtedness in a specified amount is enough, though not expressing a promise to pay.)

And see *Stansell vs. Corley*, 81 *Ga.*, 453. (Action for the debt evidenced by a sealed instrument giving a factor's lien for supplies.)

Noonan vs. Ilsley, 21 *Wisc.*, 138. (Due-bill.)

Goodwin vs. Goodwin, 65 *Ill.*, 498. (Writing reciting a sum due at death, with interest, etc., if assets be sufficient.)

³ *Veeder vs. Town of Lima*, 11 *Wisc.*, 419. (Money bond with coupons attached.)

Spaulding vs. Equitable Life Ass. Soc., 22 *N. Y. Weekly Dig.*, 18. (Tontine policy.)

Chase vs. Behrman, 10 *Daly* (N. Y.), 344, aff'g 1 *City Ct.*, 352. (A note held such an instrument, notwithstanding it recited an executory consideration.)

⁴ *Tooker vs. Arnoux*, 76 *N. Y.*, 397. (Order for payment only out of an uncertain fund.)

Carrington vs. Bayley, 43 *Wisc.*, 507. (Guardian's bond.)

Bentley vs. Dorcas, 11 *Ohio St.*, 398, 408. (An appeal bond.)

Peyser vs. McCormack, 7 *Hun* (N. Y.), 300.

Rose vs. Meyer, 1 *How. Pr. N. S.* (N. Y.), 274; s. c., 7 *Civ. Pro. R.*, 219.

⁶ *Memphis Med. Col. vs. Newton*, 2 *Handy* (*Supr. Ct. Cincinnati, Ohio*), 163. (Transcript of judgment sued on not "an instrument of writing for the unconditional payment of money only," within the statute.)

There is a difference of opinion as to whether they apply

to instruments which bind one party to the payment of money incidentally, or as a consideration for executory stipulations. Compare *Hard vs. Seeley*, 47 *Barb.* (N. Y.), 428; *Dupré vs. Rein*, 7 *Abb. N. C.* (N. Y.), 256.

The statutes are as follows:

Florida—*McClellan's Dig.*, 1881, c. 162, § 33, subd. 13-16, prescribe simple short forms of pleadings on written instruments, all of which allege what is due to plaintiff, and defendant's failure to pay.

Kansas—*Comp. L.* (1885), p. 620, § 123. "In an action, counterclaim, or set-off, founded upon an account, promissory note, bill of exchange, or other instrument, for the unconditional payment of money only, it shall be sufficient for a party to give a copy of the account or instrument, with all credits, and the indorsements thereon, and to state that there is due to him on such account or instrument, from the adverse party, a specified sum, which he claims, with interest. When others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties in the action, it shall be necessary to state, also, the kind of liability of the several parties, and the facts, as they may be, which fix their liability."

Michigan—*Howell's Anno. Stats.* (1882), c. 259, § 7346. "The plaintiff in any such action" (against makers, drawers, guarantors, indorsers, etc., of notes and bills of exchange), "and in all other actions on bills of exchange or promissory notes, may declare upon the money counts alone, and any such bill or note may be given in evidence under money counts in all cases where a copy of the bill or note shall have been served with the declaration; and the sheriff's return of service of such copy upon the defendant or defendants shall be *prima facie* evidence of such service."

Nebraska—*Code* (1881), § 129. (Same as *Kansas*, above.)

New York—*Code Civ. Pro.*, § 534. "Where a cause of action, defence, or counterclaim, is founded upon an instrument for the payment of money only, the party may set forth a copy of the instrument, and state that there is due to him thereon, from the adverse party, a specified sum, which he claims. Such an allegation is equivalent to setting forth the instrument, according to its legal effect."

North Carolina—*Code Civ. Pro.* (1883), § 263. (Same as *North Dakota*, below.)

North Dakota—*Comp. L.* (1887), § 4927; *Code Civ. Pro.*, § 131. "In an action or defence founded upon an in-

strument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum, which he claims."

Ohio—*Rev. Stat.* (1890), § 5086. "In an action, counterclaim, or set-off founded upon an account, or upon an instrument for the unconditional payment of money only, it shall be sufficient for a party to set forth a copy of the account or instrument, with all credits and the indorsements thereon, and to state that there is due to him, on such account or instrument, from the adverse party, a specified sum, which he claims, with interest; and when others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties, it shall be necessary to state the facts which fix their liability."

South Carolina—*Code of Civ. Pro.*, § 183. (Same as *North Dakota*, above.)

South Dakota—*Civ. Pro.*, § 131; *Comp. L.* (1887), § 4927. (Same as *North Dakota*, above.)

Wisconsin—*Anno. Stat.* (1889), § 2675. "In an action, defence, or counterclaim, founded upon an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum, which he claims."

Wyoming—*Rev. Stat.* (1887), § 2473. (Same as *Ohio*, above.)

§ 199. *Validity, execution, ownership, and conditions.*

—It is settled in New York that the statute makes the copy the equivalent only of pleading the terms of the instrument according to legal effect,¹ and does not dispense with alleging whatever extrinsic facts may be necessary, if any, to show its consideration,² its validity,³ the identity of defendant and the signer,⁴ and the title of plaintiff,⁵ if these facts do not sufficiently appear presumptively, at least, by the terms of the copy; and that to charge an indorser of a negotiable instrument, the extrinsic facts of dishonor and notice must be alleged.⁶

Decisions in some other States, it will be seen below, have been made in accord with the view that the object of the statute was to preserve and extend, in case of mere money instruments, all that was convenient in the

old common-law practice of common counts with a copy of the note annexed.⁷

¹ *Code Civ. Pro.*, § 534, adding a clause which declares this much at least to be the effect.

² *Spear vs. Downing*, 34 *Barb.*, 522; s. c., 12 *Abb. Pr.*, 437; 22 *How. Pr.*, 30.

³ *Broome vs. Taylor*, 76 *N. Y.*, 564, rev'g in part, and aff'g in part, 13 *Hun*, 341. (Maker's coverture appearing; facts then necessary to give validity to the contract must be alleged.)

⁴ *Vogler vs. Kirby*, 18 *N. Y. State Rep.*, 287; s. c., 15 *Civ. Pro. R.*, 337; 4 *N. Y. Supp.*, 99.

Nickels vs. Am. Railway Signal Co., *N. Y. Daily Reg.*, Feb. 26, 1884.

[*Contra* in Indiana, *Jackson vs. Burgert*, 28 *Ind.*, 36.]

⁶ *Gurnee vs. Beach*, 40 *Hun (N. Y.)*, 108; *Rose vs. Meyer*, 1 *How. Pr. N. S. (N. Y.)*, 274; s. c., 7 *Civ. Pro. R.*, 219.

[*Contra* in Ohio under the peculiar form of the statute there. *Sargent vs. Railroad Co.*, 32 *Ohio St.*, 449. But there the indorsement under which plaintiff claims must appear in the copy. *Tisen vs. Hanford*, 31 *id.*, 193.]

⁶ *Conklin vs. Gandall*, 1 *Abb. Ct. App. Dec.*, 423.

[*Contra*, *Strunk vs. Smith*, 36 *Wisc.*, 631. (Complaint against indorsers good without any allegation as to the makers, nor any as to dishonor, other than that plaintiff duly performed all conditions on his part.)]

⁷ See *Purdy vs. Vermilya*, 8 *N. Y.*, 346.

§ 200. *Form of allegation.*—Substantial compliance with the statute form as to the allegation of what is due, is enough

Smith vs. Fellows, 26 *Hun (N. Y.)*, 384. (Omission of the word "thereon," or its equivalent, after "due to the plaintiff," not ground of demurrer.)

Heinrichs vs. Wolff, 14 *Civ. Pro. R. (N. Y.)*, 428. (Omission of "from the defendants"—it appearing that they were the makers—not ground of demurrer.)

§ 201. *Language.*—A contract in a foreign language pleaded under this section may be by a copy in that language.

Nourny vs. Dubosty, 12 *Abb. Pr. (N. Y.)*, 128. (If a correct translation were used instead, alleging it to be a translation, the departure from the statute, if it be one, ought to be disregarded as immaterial.)

[s. p., *Documents*, below.]

CORPORATIONS. [Incorporation may be material (1) as indicating capacity to make the contract or incur the liability alleged (in which case the question of capacity relates to the time of the transaction); and (2) as capacity to sue or be sued, for which purpose the question of capacity relates to the time of suit. The circumstance that both aspects are usually involved in the same case and covered by the usual allegation that "at the times hereinafter mentioned was and ever since has been," has rendered it usually unnecessary to notice this distinction.]

§ 203 Necessity of alleging incorporation.

204 General allegation of organization.

§ 205 Power to act.

206 Private or foreign corporation.

207 Mode of act.

§ 203. *Necessity of alleging incorporation.*—In the absence of a statute requiring an allegation,¹ a pleading involving the existence or transactions of a corporation is not necessarily demurrable for insufficiency by reason of not alleging incorporation; for that fact may be assumed from the use of a name appropriate to a corporation, or from the fact that the party contracted with it by such a name;² and if the objection is to want of capacity to sue or be sued, the demurrer must be special, on that ground, and the want of capacity must affirmatively appear.³

The necessity is in 38 N.Y. Pl.
¹ Such statutes exist in several of the States. See *N. Y. Code Civ. Pro.*, § 1775. And in the view of Mr. Bliss such a requirement is implied in the provision of the Code that the facts constituting the cause of action must be pleaded. *Bliss on Code Pl.*, § 246.

² *Abb. Tr. Ev.*, 18, § 1.

s. p., *Union Cement Co. vs. Noble*, 15 *Fed. Rep.*, 502. Compare *Bliss on Code Pl.*, §§ 259, 260, 408.^a

³ See *Demurrer for Incapacity*.

§ 204. *General allegation of organization.*—A general allegation of the organization or creation of a corporation, or its acceptance of a charter, is sufficient on demurrer (when the statute, if private or foreign, is duly pleaded), without alleging the proceedings by which it became formed.¹

It may be otherwise where the allegations of the pleading draw in question the validity or effect of those proceedings.²

¹ *Roberts vs. Wabash, St. Louis & Pacific R. Co.* (Mo., '86), 3 *West Rep.*, 783. (Citing *Werth vs. Springfield*, 78 Mo., 107; *Stewart vs. Clinton*, 79 Mo., 609; and holding that in an allegation that "by various transfers defendant has succeeded to all the rights, privileges and immunities of, and become subject to the same penalties" as, a corporation named, under a charter and statute providing for succession upon condition of acceptance, it is not necessary that acceptance be also pleaded, for the general allegation necessarily implies an acceptance and whatever else is necessary to make the charter binding.)

Nellis vs. N. Y. Centr. R. Co., 30 *N. Y.*, 505. (Consolidation of several.)

Stanley vs. Northwestern Life Asso., 36 *Fed. Rep.*, 75. (Successor corporation.)

² *Deatrick vs. City of Defiance* (*Circ. Ct. O.*), *Monthly L. Bul.*, 342. Motion to make petition more specific. The Court say: "The averment of the petition is to the effect that it was a village; and it has been advanced to a city under the laws of the State of Ohio under the name of The City of Defiance. This is an averment of fact, not a conclusion. The proceedings by which it was advanced would be evidence of this fact and should not be pleaded. A suit brought in the name of a railroad company sets forth its organization—corporation under what State, etc., etc. In no instance the proceedings by which it became organized are set out in the pleadings. When the corporation is denied, the manner in which it became organized is evidence and should not be pleaded."

§ 205. *Power to act.*—Facts showing the power of a private domestic corporation to do an act alleged need

not be stated if the act may for all that appears be within the usual powers of such corporations.

Lindsley vs. Simonds, 2 *Abb. Pr.*, *N. S.*, 69. (Note of business corporation, expressed to be for value received.)

s. p., *Dubois vs. N. Y. & Harlem R. R. Co.*, 1 *N. Y. Leg. Obs.*, 362.

Mechanics' Banking Association vs. Spring Valley Shot & Lead Co., 25 *Barb.*, 419, rev'g 13 *How. Pr.*, 227. (Indorsement by a business corporation.)

Reformed Dutch Church vs. Veeder, 4 *Wend.*, 494. (Religious corporation suing for rent need not aver its capacity to take real property.)

§ 206. *Private or foreign corporation.*—Where the provisions of a private or foreign charter are material to the cause of action, they must be pleaded.

Hahnemannian Life Ins. Co. vs. Beebe, 48 *Ill.*, 87; *s. c.*, 1 *Withr. Corp. Cas.*, 420.

[*Compare Rogers vs. Coates*, 38 *Kans.*, 232; *s. c.*, 16 *Pacif. Rep.*, 463; *Bard vs. Chamberlain*, 3 *Sandf.*, 31; *Camden & Amb. R. R. Co. vs. Remer*, 4 *Barb.*, 127, and *cas. cit.*]

An averment in a pleading that a corporation had power to execute a contract means that it had such power by the law of its being. *Western Union Tel. Co. vs. Union Pacific Ry. Co.*, 3 *Fed. Rep.*, 1; *s. c.*, 1 *McCrary*, 418.

§ 207. *Mode of act.*—In alleging a corporate act it is not necessary to state the mode in which it was done,—as by deed,¹ or by a particular vote.²

¹ 1 *Chitt. on Pl.*, 16 *Am. ed.*, 244.

² *Over vs. City of Greenfield* (*Ind.*, 1886), 3 *West. Rep.*, 734. (Resolution requiring yea and nay vote.)

§ 170, above.

DAMAGES. [See also § 120, DEMURRER TO RELIEF, and § 154, CAUSE AND EFFECT, above; also INJURY, below.]

§ 208. Allegation showing breach of contract. § 211. Ad damnum; demand of judgment.

209. — by tort.

212. — too much.

210. Distinction between general and special damages.

§ 208. *Allegation showing damages:—by breach of contract.*—In an action on a contract to recover a sum of

money agreed to be paid, an allegation of damage is not necessary,¹ unless the sum fixed is a mere penalty, or the contract to pay is conditioned on damage.²

In an action for unliquidated damages for a breach of contract, if an executed consideration appears by the complaint, the omission to allege damages is not ground of demurrer, because plaintiff is entitled to recover at least nominal damages,³ and in such case the insertion of a claim for damages not recoverable on the facts alleged may be disregarded on demurrer.⁴

It is the better opinion that the same rule applies even in cases where the consideration is wholly executory and damages are not liquidated, and that, in such cases also, a breach without showing how plaintiff was peculiarly damaged is enough against demurrer. But the authorities are in conflict.⁵

¹ *Spicer vs. Hoop*, 51 *Ind.*, 365, 368. (Action for liquidated damages stipulated for in a special contract (and for other relief). *Held*, on motion for injunction, unnecessary to show how and to what extent damaged.)

Mahony vs. Thompson, 24 *N. Y. Weekly Dig.*, 204. (Action on contract to manufacture, seeking to recover contract price, on defendant's refusal to receive. *Held*, that, not being on breach of an executory sale, allegation of damages was not necessary.)

[And see cases at end of note 4 laying down this rule for all breaches of contract.]

[*Compare Laraway vs. Perkins*, 10 *N. Y.*, 371. (Under a contract by defendant to build a house for plaintiff and receive pay in land, the difference in value between the house and the land is the natural and necessary measure of damages; and no statement of special damages is necessary to entitle the plaintiff to give evidence thereof.)]

A complaint against bail for not justifying must allege damage. *Clapp vs. Schutt*, 44 *N. Y.*, 104; *aff'd* 19 *Abb. Pr.*, 121, s. c., 44 *Barb.*, 9; 29 *How. Pr.*, 255.

² *McGee vs. Roen*, 4 *Abb. Pr. (N. Y.)*, 8. (A contract to save from a legal liability, from a suit, claim, or demand, or the like, gives a right of action without any averment of actual damage. The legal liability is, in such case, the

measure of damages. [Citing 1 *N. Y.*, 550; 3 *Den.*, 321.])

^a *Brassell vs. Williams*, 51 *Ala.*, 349. (Compromise which the complaint showed had been at least partly performed by plaintiff.)

Alexander vs. Western U. Teleg. Co. (*Miss.*, 1889), 3 *Law R. A.*, 71; s. c., 5 *South. Rep.*, 397. (Action for delay in delivering message. Error to sustain demurrer; for, in any view of the case, appellants were entitled to recover nominal damages—the amount paid for the transmission of the message, if no more.)

^a *Barber vs. Cazalis*, 30 *Cal.*, 92, 97.

^a [Sufficient illustrations of the conflict are given below. The reason why the question remains unsettled may be that it is rarely reversible error to dismiss the complaint when only nominal damages are recoverable, unless the parties are in a court where nominal damages carry a right to substantial costs, or unless some continuing right is involved.]

Affirmative: *McCarthy vs. Beach*, 10 *Cal.*, 461. (Bond to release a mortgage, complaint alleging that by neglect to perform, foreclosure resulted and other premises were lost to plaintiff. *Held*, sufficient. With *dictum* that “for the breach of a contract an action lies, though no actual damages be sustained.” Citing *Sedgw. on D.*, 53; *Marzetti vs. Williams*, 1 *Barnw. & Ad.*, 415.)

Kenny vs. Collier, 79 *Ga.*, 743; s. c., 8 *South East. Rep.*, 58. (Holds, under Ga. Code, § 2496, that “in every case of breach of contract, the other party has a right to damages.”)

Conover vs. Manke, 71 *Wis.*, 108. (Complaint by buyer against seller in executory contract wholly unperformed; the words “to the damage of plaintiff \$79,” enough. It is wholly unnecessary to allege price or value, and ability to resell at a profit: these are matters of evidence.)

Cowley vs. Davidson, 10 *Minn.*, 392. (Action against carrier for wholly failing to transport grain, as contemplated by an executory contract: allegation of market price at the two termini; and general allegation that “by reason thereof and of the premises plaintiff has been damaged \$1750, and interest from,” etc., *held*, sufficient without allegation of sale at a loss. The Court say that a breach of contract entitles to nominal damages at any rate [citing *Sedgw. on D.*, 47; 3 *Pars. Contr.*, 217, 218; 2 *Greenl. Ev.*, § 254], and insufficiency in the

allegation of special damages could not therefore avail.)

Devendorf vs. Wert, 42 *Barb. (N. Y.)*, 227. (Action by buyer against seller for refusal to perform executory contract for sale. Referee gave judgment for defendant because, the goods having latent defect, plaintiff had lost nothing. *Held* (reviewing cases), error; but as plaintiff could have only nominal damages which would not affect costs, the judgment should not be reversed.)

[The right to recover nominal damages only is recognized in *Blot vs. Boiceau*, 3 *N. Y.*, 78, 85, 87; and in *Mills vs. Gould*, 42 *N. Y. Super. Ct. (J. & S.)*, 119, 123.]

Fitch vs. Fitch, 35 *N. Y. Super. Ct. (J. & S.)*, 302. (Contract to perform dentist work on teeth of plaintiff's daughter; unskilful work, to the discoloring and injury of the teeth; demand for damages. *Held*, not demurrable on the ground that damage to plaintiff was not alleged.)

Patterson vs. Dakin, 31 *Fed. Rep.*, 682, 685.

Negative. *Gould vs. Allen*, 1 *Wend.*, 182. (Action on covenant to purchase land: facts rendering loss probable are not enough. *So held* on special demurrer.)

Thompson vs. Gould, 16 *Abb. Pr. N. S.*, 424, 428. (Holding that in an action against buyer for damages for refusal to accept, omission to allege facts constituting damages is fatal, though it is otherwise in an action for the price.)

§ 209. — *by tort.*—In an action to recover damages for a tort, an allegation of damages is not necessary as against demurrer, for plaintiff is entitled at least to nominal damages.¹

At common law, the usual *ad damnum* clause,—“to the damage of the plaintiff,” specifying a sum,—is essential² and enough.

Under the New Procedure, a demand of judgment in a specified sum, though essential, is enough.³

¹ *Webb vs. Portland Mfg. Co.*, 3 *Sumn.*, 189 (leading Am. case). (Action for overflowing. *STORY*, J. Actual damage never necessary where there is tort.) Reiterated in *Whipple vs. Cumberland Mfg. Co.*, 2 *Story*, 661.

Glezen vs. Rood, 43 *Mass. (2 Metc.)*, 490. (Action against officer for not returning bail bond.)

s. p., *Harrington vs. St. Paul, etc., R. Co.*, 17 *Minn.*, 215, 229. (Trespass by building railroad on plaintiff's land.)

² *Treusch vs. Kamke*, 63 *Md.*, 274, 277. (A declaration in tort, although it states personal injuries, is bad on demurrer if it does not lay damage on a specified sum. This was essential at common law. So especially in any local court only having jurisdiction where the damages exceed a specified sum.)

³ See notes to next section.

[*Kenney vs. N. Y. Central R. Co.*, 49 *Hun*, 535, applies the same rule to actions on the statute for negligence, etc., causing death, on the ground that, the action being given by statute, an allegation of damages was not needed.]

§ 210. *Distinction between general and special damages.*—The rule that general damages are only such as are the natural and necessary result of the act or omission, does not mean the inevitable result; but includes all damages which there is a legal presumption, in the absence of evidence, would result.

That presumption will entitle plaintiff to nominal damages even if he give no evidence of their actual amount; and hence entitles him to maintain the action against demurrer, though he has not alleged facts showing their amount.

Thus where the wrong is an injury to the highway, the law presumes that the *public* suffer damages thereby; hence if the town sues, its pleading is sufficient without alleging special damages. *Town of Troy vs. Cheshire R. Co.*, 3 *Fost. (N. H.)*, 83.

But the law does not presume that any particular *individual* suffers damages thereby; hence if a private person sues, his pleading is insufficient on demurrer, if he does not allege special damages. *Holmes vs. Corthell*, 80 *Me.*, 1; s. c., 5 *New Engl. Rep.*, 793; *Shero vs. Carey*, 35 *Minn.*, 423; s. c., 29 *North West. Rep.*, 58.

So where the wrong is an injury to the person, the law presumes that he or she suffered damages, and his or her pleading is sufficient without an allegation of special damages: but the injury may be such that the law cannot presume that the husband or parent of the injured person suffered damages; and therefore if the husband or parent sues, his complaint is insufficient

unless it alleges special damages. *Uertz vs. Singer Mfg. Co.*, 35 *Hun* (N. Y.), 116.

[*Contrast*, on the last point, *Stone vs. Evans*, 32 *Minn.*, 243; *Kenney vs. N. Y. Central R. Co.*, 49 *Hun*, 535. (Action by personal representative for benefit of next of kin of deceased.)]

So in slander or libel by words actionable *per se*, special damages need not be alleged; but in case of words not actionable *per se* (*Walker vs. Tribune Co.*, 29 *Fed. Rep.*, 827), and in case of slander of title (*Wilson vs. Dubois*, 35 *Minn.*, 471; s. c., 29 *North West. Rep.*, 68), complaint is insufficient on general demurrer if special damages are not alleged.

The mere danger that a trespass to real property, or a nuisance, by setting water back on plaintiff's mill privilege, might if sufficiently long continued ripen into an easement, entitles plaintiff to nominal damages. *Wiley vs. Hunter*, 57 *Vt.*, 479; s. c., 2 *East. Rep.*, 228, 234.

But where a reversioner sues, he must allege facts showing that the wrong is of such permanent nature as to injure the reversion. 1 *Chitt. Pl.*, 16 *Am. ed.*, 593.

§ 211. *Ad damnum; demand of judgment.*—At Common law the words “to the damage of plaintiff” in a specified sum, or their equivalent, are essential.¹

Under the New Procedure the omission of such a clause is not ground of objection if the facts alleged show a right to some damages, and the demand of relief specifies an amount sought.²

¹ *Bronson vs. Wallace*, 4 *Blatchf. C. Ct.*, 465. (Action on a money contract. Omission of an *ad damnum* clause fatal on general demurrer; and not helped by substituting a demand of judgment as in a complaint under the Code.)

Deveau vs. Skidmore, 47 *Conn.*, 19. (Case erased from docket where writ contained no *ad damnum* clause, notwithstanding plaintiff's damage could be inferred from the declaration.)

Dalby vs. Campbell, 26 *Ill. App.*, 502. (Where there are several counts, each must contain an *ad damnum* clause.) [*Contra* on this point, *White vs. Demilt*, 2 *Hall* (N. Y.), 405, 414.]

² *Riser vs. Walton*, 78 *Cal.*, 490; s. c., 21 *Pacif. Rep.*, 362.

Spears vs. Ward, 48 *Ind.*, 541. (If the counts respectively show damage, a single prayer at the end of the complaint is enough without specifying the amount claimed under each count, respectively.)

Christal vs. Craig, 80 *Mo.*, 367; *Burkeholder vs. Rudrow* 19 *Mo. App.*, 60; s. c., 1 *West. Rep.*, 397.

Orr Water Ditch Co. vs. Reno Water Co., 19 *Nev.*, 60; s. c., 6 *Pacif. Rep.*, 72. (Complaint showing money paid, and demanding judgment, not bad for omitting to insert "to plaintiff's damage," etc.)

Conversely, it is held in Indiana that if there is an *ad damnum* clause, an omission of a separate demand for judgment is not fatal. *Louisville, etc., R. Co. vs. Smith*, 58 *Ind.*, 575.

But the better opinion is that judgment on failure to answer after demurrer overruled should not be entered unless there is an express prayer for judgment.

§ 212. *Demanding too much.*—The objection that the complaint demands a larger amount of damages than its allegations entitle plaintiff to recover is not available in support of a demurrer.

Dodge vs. Johnson, 9 *Civ. Pro. R. (N. Y.)*, 339.
s. p., *Meek vs. McClure*, 49 *Cal.*, 623, 627.

[*Contra* in Georgia, where demurrer serves also like a motion to compel amendment. *Kenny vs. Collier*, 79 *Ga.*, 743; s. c., 8 *South East. Rep.*, 58. (Demurrer as to part of damages sustained.)]

DATE. [See also §§ 123–125, PREMATURE ACTION; § 218, DELAY.]

213. Dates, if essential to the cause of action. § 215. Several events.

214. Form of allegation.

216. Continuance of fact or right.

217. On or about.

§ 213. *Dates, if essential to the cause of action.*—If it appears by the facts alleged that the sufficiency of the pleader's case depends on the precise date of a fact, the date must be alleged; and an omission to allege it,¹ or the allegation of an insufficient date,² is fatal on demurrer on the ground of not stating facts sufficient to constitute a cause of action.

This rule does not apply to a date merely required to show that the action was not prematurely brought, unless the facts showing that it was so brought affirmatively appear.³

First National Bank of Knightstown *vs.* Deitch, 83 *Ind.*, 131. (Where dates are essential to the validity of the cause of action, a demurrer will be sustained if they are left blank. [Citing 73 *Ind.*, 128 ; *ib.*, 271.])

Cox *vs.* Farmers', etc., Mut. Fire Assur. Asso., 48 *N. J. L.*, 53 ; s. c., 3 *Atl. Rep.*, 122. (Holding, in action on fire policy, that a plea of a by-law of the company, of which plaintiff had notice on the day the policy was issued, was bad for not alleging that the by-law was adopted before the contract was entered into.)

* Briggs *vs.* Fleming, 112 *Ind.*, 313 ; s. c., 14 *North East Rep.*, 86. (Holding that, under a statute requiring mortgages to be recorded within ten days, an exhibit filed with the pleading showing record after the ten days overrode an allegation in the pleading that it was within ten days, and made the pleading bad.)

* See § 124, *Demurrer, Action premature.*

§ 214. *Form of allegation.*—At common law a specific date is required for every material fact,¹ except where it may be laid with a *continuando*.

Under the New Procedure an allegation stating that the fact occurred within a period specified is enough on demurrer if each date within that period would sustain the action or defence.² And where the only materiality of a date is to show which of two events took place first, it is enough on demurrer to allege of one that it was after or before the other.³

If the specific date is desired, the remedy is by motion to make more definite or for particulars.

¹ Andrews *vs.* Thayer, 40 *Conn.*, 156. (As against special demurrer, "heretofore" is not enough ; for it simply denotes time past, in distinction from time present or time future. Hence an allegation that defendants "heretofore" committed the trespass alleged is not

enough. PARK, J., said: "It is an elementary principle of the law of pleading that there must be an allegation in the declaration of the time when any material or traversable fact took place." [Citing 1 *Swift Dig.*, 601, 603, 640, 651, 652, 702; *Story vs. Barrell*, 2 *Conn.*, 665.]

Scheible vs. Johnson, 19 *W. N. C. (Pa.)*, 108. (Plaintiff, suing for goods seized by defendant under a claim for rent, filed, after avowry, a special plea of partial eviction, which did not specify the time thereof, nor the portion from which he was evicted. *Held*, on demurrer, plea bad for uncertainty.)

Shorey vs. Chandler, 80 *Me.*, 409; s. c., 6 *New Engl. Rep.*, 739; 15 *Atl.*, 24. (Civil damage case: allegation that the sales were on divers days between two specified dates, bad even on general demurrer.)

* *Commissioners of Excise vs. Burtis*, 20 *Weekly Dig. (N. Y.)*, 272. (Action for excise penalties, for sales on each day within specified periods. *Held*, that as no motion to make definite or for particulars had been made, evidence was receivable as to each day.)

* *Kellogg vs. Baker*, 15 *Abb. Pr. (N. Y.)*, 286, and cases cited. (Pleading a release.)

§ 215. *Several events*.—When several facts are stated in one continuous sentence, or in several sentences connected by the conjunction "and," time, though alleged but once, applies to every fact.

Royce vs. Maloney, 58 *Vt.*, 437; s. c., 5 *Atl. Rep.*, 395, 399, citing *Taylor vs. Welsted*, *Cro. Jac.*, 443; 1 *Chitt. Pl.*, 258.

§ 216. *Continuance of fact or right*.—The presumption that a fact alleged to have existed on a specified date continued to a later date is not sufficient to sustain a pleading on demurrer.¹

But if facts showing a right accrued are alleged, an allegation that the right continues is not necessary.²

¹ *Parkhurst vs. Wolf*, 47 *N. Y. Super Ct. (J. & S.)*, 320.

² *Tufts vs. Johnson*, 29 *Ill. App.*, 112. (In replevin, plaintiff alleged a default in the payment of certain notes given in payment for the property, which provided that, in case of default, plaintiff could retake the property, and that it was his until all the notes were paid, but did

not expressly allege that the right to retake continued at time of suit. *Held*, a demurrer to the declaration was improperly sustained. If, after default, plaintiff waived or accepted payment, that should have been set up by way of defence.)

§ 217. "*On or about*."—Where the date is not material, or only material as showing that the fact occurred before action brought, stating it as "on or about" is sufficient on demurrer.

Bement vs. Wisner, 1 *Code R., N. S.*, 143. (Saying that the remedy was motion to make more definite and certain.)

Kansas Pacific Ry. vs. McCormick, 20 *Kan.*, 107, 110.

Leigh vs. Leigh, 1 *Dan. Ch. Pr.*, 369. (Even when time is material, an allegation that a fact occurred on or about a day specified may be sufficient, if, when reasonably interpreted, it imports a day within the requisite period. Thus where an unqualified allegation fixing the day anywhere within the year mentioned in such an allegation would establish the claim, the allegation may be held sufficient.)

Compare *District T. vs. Des Moines I. Co.*, 75 *Iowa*, 647; s.c., 36 *North West. Rep.*, 902. (The insurance petition alleged that the loss occurred on or about April 14, 1886, and that proof of loss was given on or about June 19, 1886. *Held*, on demurrer, that it did not show on its face that more than sixty days intervened, and though indefinite was not demurrable. Judgment affirmed.)

DELAY.

218. *Delay, laches, etc.*—Where delay, laches, or staleness of claim is a good ground for refusing relief, the objection may be raised in equity under a demurrer for want of equity,¹ and under the Code² for not stating facts sufficient to constitute a cause of action.

But to apply this rule the facts showing the necessary lapse of time must appear on the face of the pleading.³

¹ *Taylor vs. Holmes*, 14 *Fed. Rep.*, 498.

Speidell vs. Henrici (*Circ. Ct. W. D. Penn.*, 1883), 15 *Fed. Rep.*, 753, with note. (Action to set aside a trust. Demurrer sustained.)

[*Contra*, *Beekman vs. Hudson River West Shore R. Co.*

(*C. Ct. S. D. N. Y.*), 35 *Fed. Rep.*, 3. (Holding that where delay by a bondholder in commencing a foreclosure suit of a railroad mortgage, for a period less than that prescribed by the statute of limitations, is sought to be availed of in bar of his right to recover, the fact of such delay is a mixed question of law and fact, and should not be passed upon on demurrer.)]

² *Bell vs. Hudson*, 73 *Cal.*, 285, 2 *Am. St. Rep.*, 791; s. c., 14 *Pac.*, 791. (Action for partnership accounting.)

Hazard vs. Dillon, 34 *Fed. Rep.*, 485. (Laches in bringing a suit for the profits of a contract held not to arise on the face of the bill, where that did not show when the contract was completed.)

Jones vs. Slauson, 33 *Fed. Rep.*, 632, 636. (Holding that a bill founded on fraud will not be held bad on demurrer on the ground of a lapse of time short of the statutory period, unless the bill upon its face, without reverting to inferences, makes a clear case of unreasonable delay after discovery of the fraud. [Citing *Sheldon vs. Packet Co.*, 8 *Fed. Rep.*, 777.]

s. p., *Lincoln vs. Purcell*, 2 *Head (Tenn.)*, 143.

In *Alexander vs. Byrd*, 85 *Va.*, 690; s. c., 13 *Va. L. J.*, 105, the Court, quoting *Cole vs. Ballard*, 78 *Va.*, 139, say: "Laches is the neglect to do something which a party ought to do, and mere lapse of time, unaccompanied by some circumstances affording grounds for a presumption that the right has been abandoned, is not considered 'laches.' And claims are considered 'stale' only where gross laches is shown, with unexplained acquiescence in the assertion of an adverse right."

DELIVERY. [See also CONTRACTS, § 164.]

§ 219. *Delivery and acceptance.*—Delivery and acceptance, when used of change of possession of a thing, being correlative, an allegation of either may sufficiently import the other.

Gazley vs. Price, 16 *Johns. (N. Y.)*, 267. (Delivery of deed "according to agreement.")

s. p., *Davenport vs. Whisler*, 46 *Iowa*, 287.

Valley Railw. Co. vs. Lake Erie Iron Co., 20 *Conn. Weekly L. B.*, 383; 46 *Ohio St.*, 44. (Allegation that under a contract for payment in merchandise, the party applied for and received the goods under and in per-

formance of the contract, *held*, on demurrer, a sufficient allegation of delivery in performance of the contract.)

[See also § 182, CONTRACTS.]

Horton vs. Horton 66 *Wisc.*, 32 ; s. c., 27 *North West. Rep.*, 619. (Allegation that plaintiff delivered to defendant "a list of notes to collect," *held*, in view of the whole pleading, to import delivery of the notes.)

Clark vs. Meigs, 13 *Abb. Pr. (N. Y.)*, 467. (Allegation that defendants, plaintiff's stock brokers, sold his stock against their duty as his agents, *held*, to imply a perfected sale by delivery.)

For the difference between the popular sense of delivery, as meaning mere handing over, and the technical legal sense, see *Young vs. Clarendon Township*, 132 *U. S.*, 340, 353.

DEMAND. [See also CONTRACTS, §§ 179–199, and DULY, § 255 below.]

§ 220. Necessity:—Promise to pay, nam-	§ 222 Form of allegation.
ing time or place.	223 Demand implied from other
221 — — to pay on demand.	allegations.

§ 220. *Necessity*:—*Promise to pay, naming time or place*.—On an absolute promise, whether negotiable or not, to pay a specified sum at a specified time and place, but not stipulating for a demand, a demand need not be alleged, as against the original debtor.¹

So also of such a promise to pay at a specified time without naming a particular place ;² and of a promise to pay at a specified place without naming a time.³

¹ *Locklin vs. Moore*, 57 *N. Y.*, 360. (Holding that the rule is not confined to bills, notes, and bonds, but includes all agreements for the payment of money.)

Wallace vs. M'Connell, 13 *Pet. (U. S.)*, 136. (Holding declaration not alleging demand, sufficient to sustain judgment by default.)

² *Frank vs. Murray*, 7 *Mont.*, 4.

³ *Com'l Nat. Bank of Chicago vs. Chicago, M. & St. P. Ry. Co.*, 45 *Wisc.*, 172.

§ 221. *Promise to pay on demand*.—On an absolute promise, whether negotiable or not, to pay on demand, or

as may be requested or directed, but not expressly making demand or request a condition precedent, a demand need not be alleged as against the original debtor; for the bringing of the action is a sufficient demand.¹

Otherwise where a promise expressly requires a demand as a condition precedent,² or a statute expressly requires demand.³

¹ *Ernst vs. Bartle*, 1 *Johns. Cas. (N. Y.)*, 319.

Clute vs. McCrea, 12 *N. Y. State Rep.*, 647. (Allegation that defendant promised to repay loan "as plaintiff might direct," does not require demand, because this is what the law implies from a loan.)

² *Walker vs. Welch*, 13 *Ill.*, 674. (A charge for goods sold, and promise to pay on request.)

Potomac Mfg. Co. vs. Evans, 84 *Va.*, 717; s. c., 6 *South East. Rep.*, 2. (Trust deed enforceable six months after demand; bringing of suit is not a sufficient demand, so as to sustain a decree six months later.)

³ *McLean vs. Manhattan Medicine Co.*, 54 *N. Y. Super. Ct. (J. & S.)*, 371; s. c., 6 *State Rep.*, 805, rev'g 3 *State Rep.*, 550. (Action for personal tax.)

By statute in Missouri, omission to demand before suit must be pleaded by defendant. *Lee vs. Casey*, 39 *Mo.*, 383.

§ 222. *Form of allegation.*—Where demand is merely necessary to perfect the obligation, and no other act is required of the party making it, and no time or place limited for making it, a general allegation of demand, or qualifying the allegation of breach by the words "although often requested," is enough on demurrer.

Hobert vs. Hilliard, 28 *Mass. (11 Pick.)*, 143.

Dyer vs. Rich, 42 *Mass. (1 Metc.)*, 180; *Lent vs. Padelford*, 10 *Mass.*, 239. (Alternative contracts.)

Frank vs. Murray, 7 *Mont.*, 4; s. c., 14 *Pacif. Rep.*, 654. (Allegation "that at various times before the commencement of this suit plaintiff demanded of said defendant" the specified sum, sufficient on a verbal contract to pay.)

Ohio, for the Use of Burritt and Wife, vs. Cowles, 5 *Ohio St.*, 87. (Action on administrator's bond under a statute

which expressly required a previous demand. General allegation good on general demurrer.)

Harris vs. Perry, 2 *Bush* (Ky.), 101. (Action against constable, statute requiring previous demand. General allegation good, especially after verdict.)

§ 223. *Demand implied from other allegations*.—An allegation of refusal is equivalent to an allegation of demand and refusal.

Hammond vs. Mason & H. Organ Co., 92 *U. S.*, 724; s. c., 23 *Law. ed.*, 767. (Sufficiency of plea to bill in equity.)

Malone vs. Minnesota Stone Co., 36 *Minn.*, 325; s. c., 31 *N. W.*, 170. (So held on motion for judgment on the pleadings.)

Foulks vs. Foulks, 6 *N. Y. Supp.*, 112. (Action for legacy.)

Hutchins vs. Wade, 20 *Tex.*, 7. (Action on promise to “pay out of the proceeds of my present crop.”)

Divan vs. Loomis, 68 *Wisc.*, 150; s. c., 31 *North West. Rep.*, 760. (Contract for support.)

Berney vs. Drexel, 33 *Hun* (N. Y.), 34. (In an action for conversion, if a demand be necessary, an allegation of conversion is enough, because it would let in evidence of demand and refusal.)

DESCENT. [See also HEIR and TITLE.]

§ 224. *Effect of allegation*.—An allegation that the premises descended to a person named as the heir of another, sufficiently imports that he was such heir¹ and came into possession.²

¹ *St. John vs. Northrop*, 23 *Barb.* (N. Y.), 25.

Contra, *Montgomery vs. White*, 10 *Ky. L. R.*, 905; s. c., 11 *Southwest. Rep.*, 10. [Compare § 266, *Heir.*]

² So held of plaintiff's title and possession, in partition. *Wainman vs. Hampton*, 20 *N. Y. Weekly Dig.*, 68.

DETENTION.

§ 225. *Wrongfulness*.—If facts are alleged showing title and apparent right of possession in plaintiff, an allegation that defendant became possessed and refused to

deliver on demand, and wrongfully detains the property, is sufficient, on demurrer.¹

An allegation of wrongful detention, without alleging wrongful taking, or demand and refusal, is an allegation of a mere conclusion, and insufficient on demurrer.²

¹ *Griffin vs. Long Island R. R. Co.*, 101 *N. Y.*, 348; s. c., 4 *North East. Rep.*, 739. (Replevin.)

Sheldon vs. Hoy, 11 *How. Pr. (N. Y.)*, 11. (Conversion.) [In *Louisville, etc. Ry. Co. vs. Payne*, 103 *Ind.*, 183; s. c., 2 *North East. Rep.*, 582, where the petition added that the wrongful detention was under execution against plaintiff on a judgment which is "absolutely void,"—held, that the latter was a conclusion of law, and rejecting this, the petition showed detention under execution, which could not be deemed wrongful.]

² *Seifert vs. Kraft*, 13 *Civ. Pro. R. (N. Y.)*, 321. (Replevin.) [*Contra*, *Simser vs. Cowan*, 56 *Barb.*, 395.]

DISCLAIMER.

§ 225a. *Sufficiency*.—A disclaimer which avails to exonerate defendant from costs is not bad on demurrer, although it be not sufficient to bar the action.

McAdams vs. Lotton, 118 *Ind.*, 1; s. c., 20 *North East.*, 523. (Ejectment.)

DOCUMENTS. [For rules applicable to pleading contracts rather than other documents, see CONTRACTS, where are treated signature; statute of frauds; performance of conditions; breach, etc.]

A. Documents pleaded in the absence of statutory regulation.

- § 226. Necessity of copy or substance.
- 227. Pleading legal effect.
- 228. Copy embodied in the pleading.
- 229. Copy annexed and referred to.
- 230. Language.
- 231. Ambiguities.

- § 232. Copy accompanied by allegation of legal effect: Inconsistency between pleading and exhibit.
- 233. Demurrer not aided by original.

B. Documents furnished under Statutes or Rules of Court, requiring Exhibits to be Annexed or Filed.

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| <p>§ 234. What deemed a written "instrument."</p> <p>235. — subscription paper.</p> <p>236. What is foundation of the action.</p> <p>237. — to construe, reform or cancel.</p> <p>238. — document collaterally involved.—Action on contract.</p> <p>239. — — action of tort.</p> <p>240. — muniments of title.</p> <p>241. Exhibit not called for by statute.</p> <p>242. False reference to filing.</p> <p>243. Indorsements; Ownership of chose in action.</p> <p>244. Demurrer for failure to furnish exhibit.</p> | <p>§ 245. Copy in body of pleading enough.</p> <p>246. Exhibit which is mere evidence not noticed on demurrer.</p> <p>247. Contract not shown to be in writing.</p> <p>248. Reference to exhibit and identifying.</p> <p>249. Appropriate words of reference.</p> <p>250. — several counts.</p> <p>251. What omissions in pleading supplied by exhibit.</p> <p>252. Excuse for not furnishing.</p> <p>253. Amended pleading.</p> <p>254. State practice in U. S. Court.</p> |
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A. Documents Pleaded in the absence of Statutory Regulation

§ 226. *Necessity of copy or substance.*—To plead a document merely by name, or allege that it was of a particular class, such as a mortgage or a release, without stating its substance, or at least so much thereof as is essential to the pleader's case, is insufficient on demurrer.

Marshall vs. Turnbull, 34 *Fed. Rep.*, 827.

Morton vs. Grafflin, 68 *Md.*, 545; s. c., 11 *Cent.*, 514; s. c., 13 *Atl.*, 341. (Creditor's suit in aid of attachment. Demurrer sustained because the proceedings in attachment were not so set out; notwithstanding a statute allowing the production of the record as evidence instead of a transcript. *Dictum* that the defect was amendable.)

s. p., *People vs. De la Guerra*, 24 *Cal.*, 78.

King vs. Trice, 3 *Ired. (N. C.) Eq.*, 568; *Martin vs. McBryde*, *id.*, 531.

Hussey vs. Smith, 1 *Utah*, 241. (Foreclosure: allegation that defendant "gave a mortgage" a mere conclusion of law.)

[*Contra, Miller's Pl. (Iowa)*, 129.]

§ 227. *Pleading legal effect.*—Under the New Procedure, as formerly, a document may be pleaded by legal effect, that is to say by stating its substance, or the substance of such part as the pleader relies on, without purporting to give its words, or a copy,¹ except where there is a statute requiring a copy to be furnished.²

¹ *Kehlenbeck vs. Logeman*, 10 *Daly* (N. Y.), 447. (By-law of association.)

Wallace vs. Eldredge No. 2, 27 *Cal.*, 499. (Allegation that a contract was payable in a specified medium.)

² See § 234, below.

§ 228. *Copy embodied in the pleading.*—At Common Law,¹ and in Equity,² a pleading may set forth at length any document material to the case of the pleader (not being mere evidence); and if from the allegations of the pleading the instrument appears to be binding on the adverse party,—whether because made by him, or because conclusive on him as a public official act,³—the material facts stated in the document are thereby sufficiently alleged as against him without a separate allegation of their truth in the pleading.⁴

It is the better opinion that the rule is the same under the New Procedure, except where there is a statute requiring express allegation of some fact so appearing.⁵

¹ *Ward vs. Sackrider*, 3 *Cal.*, 263. (Statement of consideration in instrument set forth and alleged to have been executed by the adverse party.)

Dickerson vs. Derrickson, 39 *Ill.*, 574. (The same.)

s. p., *United States vs. Morris*, 10 *Wheat.* (U. S.), 246, aff'g 1 *Paine*, 209. (Plea setting forth a Secretary of the Treasury's warrant of remission, in which the jurisdictional facts supporting his issue of the warrant were recited.)

² See authorities to next section.

³ See for instance *United States vs. Morris*. (*Above cited.*)

⁴ In *City of Los Angeles vs. Signoret*, 50 *Cal.*, 298, it was held that facts so stated are not thereby sufficiently

alleged, if preliminary or collateral, such as the recital of the steps preliminary to an assessment. Followed in *Lambert vs. Haskell*, 80 *Cal.* 611; s. c., 22 *Pacif. Rep.*, 327.

s. p., *Briggs vs. Fleming*, 112 *Ind.*, 313; *Blackburn vs. Crowder*, 108 *Ind.*, 238.

* *Murdock vs. Brooks*, 38 *Cal.*, 596. (Action on undertaking.)

Budd vs. Kramer, 14 *Kans.*, 101. (Allegation that defendant executed an instrument which is set out in full, is a good allegation that he promised, etc., as therein appearing.)

Elmquist vs. Markoe, 39 *Minn.*, 494, 40 *N. West.*, 825. (Words "value received" in the instrument sued on.)

Prindle vs. Caruthers, 15 *N. Y.*, 425. (The same.)

Slack vs. Heath, 4 *E. D. Smith* (*N. Y.*), 95, 109; s. c., 1 *Abb. Pr.*, 331. (Complaint on undertaking in replevin; recitals contained in the undertaking held a sufficient allegation of the facts recited.)

[*Contra*,—practice disapproved as to instruments other than for unconditional payment of money,—*Crawford vs. Satterfield*, 27 *Ohio St.*, 421; but held that, demurrer not being interposed, the objection could not be raised at the trial.]

[For other authorities *contra* see notes to next section.]

A document which is merely a statement by the party pleading, not connected with the adverse party, by allegation, cannot be thus used. *Murphy vs. Estes*, 6 *Bush* (*Ky.*), 532. (Plaintiff's statement of money paid. The Court say the petition itself must state a cause of action.)

§ 229. *Copy annexed and referred to.*—In Equity, a document material to the case of the pleader may be pleaded by annexing a copy thereof and referring to it in the body of the pleading, alleging that it is a copy and is made a part of the pleading; this having the same effect as if the document were copied into the body of the pleading.¹

It is the better opinion that this convenient rule is still in force under the New Procedure, in all actions whether legal or equitable.²

An acknowledgment or other authentication included

as a part of the copy, is a sufficient allegation that the original was certified in like form.³

To make a copy thus annexed a part of the pleading, in the absence of a statutory provision on the subject it must be both annexed, and stated in the pleading to be made a part of the pleading; otherwise it cannot be regarded on demurrer.⁴

¹ *Johnson vs. Anderson*, 76 *Va.*, 766. (Foreign attachment in chancery: supplemental bill alleging and annexing as an exhibit a copy of a foreign decree. *Held*, that it constituted part of the bill, and the Court on demurrer might look into the decree as if actually incorporated in the bill.)

Followed in *Thompson vs. Clark*, 81 *Va.*, 422. (Holding that exhibits filed with and prayed to be taken as part of a bill are as much a part of it as if actually incorporated therein.)

Whether proper at common law, compare *Fitch vs. Cornell* (*Circ. Ct. Oreg.*), 1 *Sawy.*, 156; *Oh Chow vs. Hallett*, 2 *id.*, 259, against it; and *Secombe vs. Steele*, 20 *How. U. S.*, 94, where such an exhibit was treated as part of the pleading.

² *Lambert vs. Haskell*, 80 *Cal.*, 611. (Conceding, however, that the recitals in the copy cannot supply the lack of matters of substance preliminary or collateral to the instrument.)

Bishop vs. Empire, etc., Co., 33 *N. Y. Super. Ct. (J. & S.)*, 99. (Allegation that an instrument, a copy of which is annexed, contains the terms and conditions of the agreement between the parties, is an allegation of fact that the parties agreed on the terms and conditions contained in the annexed paper.)

Alfaro vs. Davidson, 40 *N. Y. Super. Ct. (J. & S.)*, 87. (Sufficient without alleging that the original was in writing.)

Eng. Com. L. Procedure Act 1852, § 56.

[*Contra*, compare the following cases, in some of which, however, the decision seems to have turned on the effect of the statute of the State, or on other reasons consistent with the rule in the text: *Sorrells vs. McHenry*, 38 *Ark.*, 127; *Brooks vs. Paddock*, 6 *Colo.*, 36; *Watkins vs. Brunt*, 53 *Ind.*, 208; *Platt vs. Brickley* 119 *Ind.*, 333; s. c., 21 *North East. Rep.*, 906; *Gebhard vs. Gardner*, 12 *Bush (Ky.)*, 321; *Dietz vs. Corwin*, 35

Mo., 376; *Bowling vs. McFarland*, 38 *id.*, 465; *Lanmore vs. Wells*, 29 *Ohio St.*, 13; *Olney vs. Watts*, 43 *id.*, 499; *Burks vs. Watson*, 48 *Tex.*, 107; *Johnson vs. Home Ins. Co.* (*Wyo.*, 1885), 6 *Pacif. Rep.*, 729.]

In *Yeiser vs. Todd* (*Mem.*), 6 *Ky. L. Rep.*, 597 (mechanic's lien), an allegation that plaintiff "performed his contract with defendant as set out in the said itemized account," with exhibit containing items, but no statement that the items were correct, was *held*, not an allegation that the plaintiff did the work and furnished the material mentioned in the exhibit.

* *New vs. Bame*, 3 *Sandf. (N. Y.) Ch.*, 191. (Acknowledgment and record of instrument in schedule annexed.) And see § 164.

* Annexing not enough. *Scott vs. Union County*, 63 *Iowa*, 583; s. c., 19 *North West. Rep.*, 667; *Harrison vs. Vreeland*, 9 *Vroom (N. J.)*, 366; *Brown vs. Warden*, 15 *id.*, 177.

Filing not enough. *Caton vs. Willis*, 5 *Ired. Eq. (N. Car.)*, 335.

Referring to as part of the pleading, without annexing, not enough. *People vs. De la Guerra*, 24 *Cal.*, 73, 78. *Pacific R.R. of Missouri vs. Missouri Pacific Ry.*, 111 *U. S.*, 505. (So holding even of a record referred to with a prayer of leave to refer to it as evidence on the trial.)

Annexing and referring to, without expressly adopting as a part of the pleading, not enough. *Mercantile Trust Co. vs. Kanawha & O. Ry. Co.*, 39 *Fed. Rep.*, 337. (So held even in foreclosure of railroad mortgage on a line running through both jurisdictions. Petition founded on such a bill therefor denied, and an order bringing in new parties vacated, and dismissal of the bill ordered unless plaintiffs should amend.)

Filing and referring to, without expressly adopting as part of the pleading, not enough. *Terry vs. Jones*, 44 *Miss.*, 540. [*Contra*, *Gray vs. Commercial Bank*, 1 *Rob. (La.)*, 533.]

§ 230. *Language*.—An instrument in a foreign language may be pleaded by using, instead of a copy of the original, a correct translation, alleging it to be such.

Christenson vs. Gorsch, 5 *Iowa*, 374. (Because the statute requiring pleadings to be in English justifies it.)

Lambert vs. Blackman, 1 *Blackf. (Ind.)*, 59. (Because, if it does not satisfy the practice requiring a literal copy,

it is yet equivalent to pleading the legal effect.) s. p.,
Generes vs. Simon, 21 *La Ann.*, 653.
 [s. p., § 201.]

§ 231. *Ambiguities*.—If a document pleaded by copy which contains ambiguities require evidence of extrinsic facts to render it sufficient, the pleading must contain the necessary allegations of such facts.

Worthington vs. McDonald, 4 *Ind.*, 483.
Riley vs. Vanhouton, 5 *Miss.* (4 *How.*), 428.

§ 232. *Copy accompanied by allegation of legal effect: inconsistency between pleading and exhibit*.—A pleading which contains a sufficient allegation of a matter of fact is not made insufficient by the annexing of a copy of a document which does not bear out the allegation, if the discrepancy is such as may be presumed to be a clerical error in the copy.¹

But if the allegation is of the substance, purport, or legal effect of the contents of an instrument which is alleged as binding the adverse party, and the contents of the copy are affirmatively variant in a manner not to be accounted for by clerical error, the copy, if effectually made part of the pleading, controls the allegation alike for the purpose of sustaining or condemning the pleading.²

If the document is one not binding the defendant, such as a map or diagram, it cannot avail in favor of the pleader to supersede a formal allegation in the pleading which is variant from it.³

[These are the principles which underlie the following cases. The rule may be modified by the statutes in some jurisdictions absolutely requiring a copy of the instrument sued on to be annexed or filed.]

¹ *Blasingame vs. Home Ins. Co.*, 75 *Cal.*, 633; s. c., 17 *Pacif. Rep.*, 925. (Action on fire policy issued to third person, but alleged to have contained "loss, if any, payable to plaintiff." Omission of that clause from the

copy annexed and referred to as containing it did not render the complaint demurrable.)

Mendocino County vs. Morris, 32, *Cal.*, 145. (Allegation that defendants signed sufficient, though copy of instrument annexed did not contain signature of all.) [*Compare* **Bonnell vs. Griswold**, below cited, where the contrary was held, the instrument annexed purporting in its introduction to be only made by that part of the defendants whose signatures were appended.]

* **Wheeler vs. McCormick**, 8 *Blatchf.*, 267. (Allegations pleading an instrument according to its legal effect, though otherwise sufficient, fail if the pleader adds "as will fully appear by reference to a true copy hereto annexed," and the copy annexed is of a substantially different effect. Here the allegations were of the object and relief in a former suit, and the bill annexed showed that the allegations misconceived it.)

Bonnell vs. Griswold, 68 *N. Y.*, 294, *affi'g* **Bonnell vs. Wheeler**, 16 *Abb. Pr., N. S.*, 81, 1 *Hun*, 332; s. c., 3 *Supm. Ct. (T. & C.)*, 557. (Allegation that defendants signed a report "a copy of which is hereto annexed," etc. The copy purported to be the report of, and signed by, only a part of the defendants. *Held*, bad on demurrer.)

State, Loeb vs. Barris, 50 *N. J. L.*, 382; s. c., 12 *Cent.*, 79, 13 *Atl.*, 602. (Demurrer sustained because the copy lease annexed showed that plaintiff did not sign nor covenant, but that the instrument was the contract of her agent. [Citing other cases.])

United States vs. Ames, 99 *U. S.*, 35, 45. (Allegation that signature was for the firm not admitted by demurrer when copy annexed showed individual, not firm, signature.)

Rose vs. Feldman, 67 *Cal.*, 100; s. c., 7 *Pac. Rep.*, 185. (Allegation that defendant individually signed not admitted when copy annexed bore firm signature.)

State, Graham vs. Nichols (Iowa), 41 *N. W.*, 4. (Allegation that an order "is a secret, oath-bound and voluntary fraternal society, organized only and solely for social, benevolent, and fraternal purposes," is a mere conclusion of law, and cannot control the force of provisions of the constitution of the order, set out in the pleading, which show that the main object of the association is to provide insurance for its members.)

[For other cases to the point that an allegation of the effect of the document cannot countervail the document itself when pleaded, see the following: **Dillon vs. Barnard**, 21 *Wall. (U. S.)*, 430, 437, 1 *Holmes*, 386; **Stoddard vs. Treadwell**, 26 *Cal.*, 294; **North vs. Kizer**, 72 *Ill.*, 172;

Smith *vs.* Webb, 16 *Ill.*, 105; Litell *vs.* Hoagland, 106 *Ind.*, 320; s. c., 6 *North East. Rep.*, 645; Read *vs.* Yeager, 3 *North East. Rep.*, 856; Stroup *vs.* Haycock, 56 *Iowa*, 729; s. c., 10 *North West. Rep.*, 257; Thornton *vs.* Malqueen, 12 *Iowa*, 549; Board of Education *vs.* Shaw, 15 *Kan.*, 33; Lea *vs.* Robeson, 12 *Gray (Mass.)*, 280; Whitney *vs.* Rhoades, 85 *Mass.* (8 *Allen*), 471; Buffalo Catholic Inst. *vs.* Bitter, 87 *N. Y.*, 251; Bogardus *vs.* N. Y. Life Ins. Co., 101 *N. Y.*, 328; Morrison *vs.* Insurance Co., 69 *Tex.*, 353, 5 *Am. St. R.*, 63.]

- * Remy *vs.* Municipality No. 2, 12 *La. Ann.*, 500. (As a general principle, a plan annexed to a petition should be used to explain anything that is ambiguous or unexplained in the petition, but it cannot control a written description of the metes and bounds of the land claimed in which there is nothing ambiguous.)

§ 233. *Demurrer not aided by original.*—The production of an original document, even though it be a record, if not so pleaded as to be made a part of the pleading cannot make the pleading demurrable, nor can it be used on demurrer to contradict the pleading.¹

But according to the better opinion, a document produced on oyer, whether in Equity² or at Common Law,³ forms part of the pleading of the party producing it; and if insufficient, demurrer lies.

¹ Noonan *vs.* Bradley, 9 *Wall.*, 394, 401.
Story's Eq. Pl., 414, § 452b.

* Bogart *vs.* Hinds, 25 *Fed. Rep.*, 484.

² Mott *vs.* Burleson, 2 *G. Greene (Iowa)*, 600; Douglass *vs.* Rathbone, 5 *Hill (N. Y.)*, 143.

B. *Documents Furnished under Statutes or Rules of Court requiring Exhibits to be Annexed or Filed.*

[For these statutes, and their object, see RECEPTION OF EVIDENCE,—*Documents.*]

§ 234. *What deemed a written "instrument."*—Statutes requiring instruments in writing, when pleaded, to be furnished or filed as exhibits, apply to bonds¹ and recognizances.²

But not to a bill of items³ for goods sold by plaintiff to defendant, nor to a resolution of a municipal corporation defendant⁴ accepting plaintiff's offer to sell; nor to a judgment,⁵ nor an execution even when pleaded as a justification,⁶ nor a tax levy,⁷ nor to official⁸ or legal proceedings⁹ sought to be enjoined by the party alleging them.

¹ See *McGary vs. Barr* (*Pa.*, 1890), 19 *Atl. Rep.*, 45. (Action on replevin bond.)

² *Kiser vs. State*, 13 *Ind.*, 80. (Error to overrule demurrer.)

³ *Kingsland & F. Mfg. Co. vs. St. Louis M. I. Co.*, 29 *Mo. App.*, 526.

⁴ *Over vs. City of Greenfield* (*Ind.*, 1886), 3 *West.*, 734.

⁵ *Becknell vs. Becknell*, 110 *Ind.*, 42; *Hopper vs. Lucas*, 86 *id.*, 43.

Dougherty vs. Longmore, 2 *Cinn. Super. Ct. R.*, 134. So also of foreign judgments.

Judds vs. Dean, 2 *Disney* (*Ohio*), 210.

Omahundro vs. Clarkson, 13 *Mo. App.*, 582.

⁶ *Thurston vs. Boardman*, 1 *Wilson* (*Ind.*), 433.

⁷ *Hazzard vs. Heacock*, 39 *Ind.*, 172. (Tax duplicate.)

⁸ *Logansport vs. La Rose*, 99 *Ind.*, 117; *Huff vs. Lafayette*, 108 *id.*, 14.

⁹ *Collins vs. Fraiser*, 27 *Ind.*, 477; *Matheney vs. Earl*, 75 *id.*, 531. (Actions to enjoin collection of judgment.)

Hall vs. Hough, 24 *Ind.*, 273; *Trueblood vs. Hollingsworth*, 48 *Ind.*, 537. (Actions to enjoin execution sale.)

§ 235. — *subscription paper*.—A statute requiring the original instrument to be filed is not applicable to a subscription paper, as it may be required in several suits between different parties at different places.¹

¹ *Workman vs. Campbell*, 46 *Mo.*, 305.

But a subscription paper was held within the statute of Iowa in *Hudson vs. Plank Road Co.*, 4 *G. Greene* (*Iowa*), 152.

§ 236. *What is "foundation" of the action*.—In the application of the rule that an instrument which is the

basis or foundation of the action must be furnished as an exhibit, the following distinctions have been observed :

In an action on a bond,—as for instance an attachment bond,—the bond is the basis of the suit.¹

In the case of an injunction bond, the proceedings in the injunction suit are not.²

So in a suit on an administrator's bond, the final settlement of his account, the non-compliance with which constituted a breach, is not.³

Where a written contract declared on is in several distinct parts, all are required.⁴

A collateral paper, containing conditions affecting the obligation of the contract sued on, and referred to therein as such, must be furnished.⁵

But a deed or conveyance constituting merely the consideration for the obligation sued on need not be furnished.⁶

A supplemental contract, forming a part of the actual contract sued on, must be furnished.⁷

A written order for the goods, the price of which is sued for, being a mere memorandum, not expressing price, but only number and quality, is not the "foundation" of the action.⁸

Nor is a written order for the payment of the money sued for.⁹

In case of foreclosure founded on a note and mortgage, the mortgage must be furnished ; and the note also, if a personal judgment is sought.¹⁰

In an action on a subscription paper, a copy of the subscription should be furnished.¹¹

In an action on an assessment by a ditching or draining company against a member, the assessment is within the statute,¹² but not the other papers and proceedings.¹³

So notice of the proceedings for the assessment,¹⁴ or notice of a call on subscribers for stock in a corporation,¹⁵ although essential to be proved to sustain the action, are

not "the foundation" of the action within the meaning of the statute.

¹ *Bunt vs. Rheum*, 52 *Iowa*, 619.

² *Cress vs. Hook*, 73 *Ind.*, 177. (Holding it error, therefore, where a copy of the proceedings were unnecessarily filed, to sustain a demurrer because they did not support the complaint.)

³ *State, Edwards, vs. Bartlett*, 68 *Mo.*, 581. (Holding it mere evidence, and need not be filed.)

⁴ *Johnson vs. Tostevin*, 60 *Iowa*, 46. (Contract consisting of written order, and letter and answer thereto, relating to such order. Demurrer sustained because a copy of the answer was not filed.)

⁵ *Titlow vs. Hubbard*, 63 *Ind.*, 6. (Note expressed to be subject to certain conditions contained in a written agreement between the parties of the same date.)

Busch vs. Columbia, etc., Asso., 75 *Ind.*, 348. (Note payable according to conditions in a mortgage and a constitution, by-laws, and regulations of the association. Here the mortgage and the constitution, etc., were held necessary.)

The contrary held in an action on a note payable to a building and loan association, which merely stated, "This obligation is given for money loaned under the constitution, by-laws, and regulations of said association." Here the plaintiff need not exhibit such constitution, by-laws, and regulations. *Anderson B. L. F. & S. Asso. vs. Thompson*, 88 *Ind.*, 405.

[*Contra* also of the application for insurance, referred to in the policy sued on. *Mut. Benefit Life Ins. Co. vs. Cannon*, 48 *Ind.*, 264.

[*Continental Life Ins. Co. vs. Kessler*, 84 *Ind.*, 310. (This decision was put upon the ground that the code was designed to simplify the common-law practice by eliminating burdensome technicalities of pleading, and is to be reasonably construed. The plaintiff sues upon the obligation as evidenced by the instrument delivered to him, and if there is a collateral paper, which contains conditions necessary to have been performed by him, he must allege that performance generally, and, unless such performance be denied, no proof on the subject is required. R. S., 1881, sec. 370. If the defendant wishes to make an issue upon any condition contained in such collateral paper, he may set it up in answer. The policy delivered to the assured was

the "written instrument" on which the action was founded.)]

- ⁶ *Nordman vs. Craighead*, 27 *Ark.*, 369. (Deed mentioned only as conveying the land which was the consideration of the note sued on.)

Emmons vs. Kiger, 23 *Ind.*, 483. (Action on contract of sale.)

- ⁷ *Potts vs. Hartman*, 101 *Ind.*, 359.

- ⁸ *Deere vs. Lewis*, 51 *Ill.*, 254.

- ⁹ *Harwood vs. Case*, 37 *Iowa*, 693. (Mandamus.)

- ¹⁰ *Roche vs. Moffitt*, 107 *Ind.*, 58; s. c., 2 *West.*, 253.

- ¹¹ *Hudson vs. Plank Road Co.*, 4 *G. Greene (Iowa)*, 152.

The contrary held under the Missouri statute, which requires the original to be filed, where the original contained many names of subscribers besides that of the defendant. *Workman vs. Campbell*, 46 *Mo.*, 305.

- ¹² *Jerrell vs. Etchison Ditching Asso.*, 62 *Ind.*, 200.

Smith vs. Clifford, 83 *Ind.*, 520.

State, Mayfield, vs. Myers, 100 *Ind.*, 487.

- ¹³ *Pickering vs. State*, use of Dyar, 106 *Ind.*, 228.

Wishmier vs. State ex rel. Wilcox, 110 *Ind.*, 523; s. c., 11 *North East. Rep.*, 291. (Holding that so much of the report as affects the party to the suit or his land is enough. Also that if other documents are furnished, the omission to state expressly which is the foundation of the action is not ground of demurrer.)

- ¹⁴ *Jackson vs. State*, use of Lindley, 103 *Ind.*, 250; s. c., 1 *West. Rep.*, 269.

- ¹⁵ *Fox vs. Allensville, etc., Turnpike Co.*, 46 *Ind.*, 31.

§ 237. *The same*;—in action to construe, reform, or cancel.—Where the object of the pleading is to obtain the judicial construction¹ or the reformation² of a written instrument, the instrument is within the statute.

Otherwise if the object is to obtain cancellation.³

- ¹ *McMahan vs. Newcomer*, 82 *Ind.*, 565. Cross-complaint, or counter-claim, asserting title by devise and annexing a copy of the will. Defendant claimed that the copy of the will was not to be looked to in determining the sufficiency of his pleading, because it is not the foundation of his cause of action. ELLIOTT, J., says: It is, perhaps, true, "that it is not the foundation of the pleading, but

it is a written instrument presented to the Court for the purpose of obtaining a judicial construction. Where the judgment of the Court is sought as to the construction of a will, it is necessary to make it a part of the pleading; and this may be done by filing it as an exhibit."

* *Overly vs. Tipton*, 68 *Ind.*, 410.

Cottrell vs. Aetna Life Ins. Co., 97 *Ind.*, 311.

* *Watkins vs. Brunt*, 53 *Ind.*, 208; *Stribling vs. Brougher*, 79 *Ind.*, 328; *Boyd vs. Olvey*, 82 *Ind.*, 294. (Cancellation of deeds.)

Briscoe vs. Johnson, 73 *Ind.*, 573. (Discharge of guardian, and receipt by ward.)

Gardner vs. Fisher, 87 *Ind.*, 369. (Cross-complaint to cancel note sued on.)

Vannice vs. Green, 14 *Iowa*, 262. (Confession of judgment; sought to be set aside for insufficiency of statement.)

Walkup vs. Zehring, 13 *Iowa*, 306. (Execution and sheriff's deed thereon.)

Johnson vs. Moore, 112 *Ind.*, 91; s. c., 13 *N. East.*, 106. (Note and mortgage.)

§ 238. *The same;—Documents collaterally involved.*—*Actions on contract.*—In an action to recover money received by defendant to the use of the plaintiff, the evidence of debt by collecting or enforcing which defendant obtained the money is not within the statute.¹

So where a surety sues for contribution, the contract in which the parties became sureties is not within the statute.²

So in a suit against a bank to recover a statutory penalty for delaying payment of its bills, the declaration need not set out copies of the bills.³

* *Crane vs. Buchanan*, 29 *Ind.*, 570. (Deed absolute on its face, but in fact a mortgage: action against grantee for surplus received on the sale.)

Hight vs. Taylor, 97 *Ind.*, 392. (Note and life policy assigned for collection: action to recover proceeds.)

Watts vs. Fletcher, 107 *Ind.*, 391. (Note transferred for collection: action for proceeds lost by negligence.)

Ruddick vs. Marshall, 23 *Iowa*, 243. (A junior mortgagee suing mortgagor for amount adjudged, in foreclosure, to be equitable proportion due on senior mortgage,

under a statute, need not exhibit the record or decree of foreclosure.)

Barney vs. Buena Vista County, 33 *Iowa*, 261. (Here the petition alleged that plaintiff, in making a payment into county treasury, presented a warrant for a certain sum more than the payment, and that the treasurer cancelled the warrant, giving him two others which he issued without authority, on which payment was refused when presented, and he sues for the sum due him. Demurrer sustained, because warrants not set forth nor copied. *Held*, error. Suit not founded on the first warrant, because defendant has cancelled that; and not on the others, because treasurer had no authority to issue them. Suit is in nature of an action for money had and received.)

^a *Carr vs. Waldron*, 44 *Mo.*, 393.

Porter vs. Waltz, 108 *Ind.*, 40; s. c., 8 *N. East. Rep.*, 705.

^a *Suffolk Bank vs. Lowell Bank*, 8 *Allen (Mass.)*, 355. (Pleading by legal effect is enough.)

§ 239. *The same*; — — *action of tort*.—In an action for malicious prosecution the judgment, or proceedings theretofore, are not required.¹

So in an action for unlawful levy on exempt property, the schedule and appraisal on which plaintiff relies for his exemption are not within the statute.²

¹ *Bernard vs. Cafferty*, 11 *Gray (Mass.)*, 10.

² *Huseman vs. Sims*, 104 *Ind.*, 317; s. c., 4 *N. East. Rep.*, 42.

§ 240. *The same*;—*muniments of title*.—In an action to quiet title,¹ or for partition,² the mere title deeds of a party are not the foundation of the action within the statute.

¹ *Rausch vs. Trustees of United Brethren*, 107 *Ind.*, 1; s. c., 4 *West. Rep.*, 720.

Smith vs. King, 81 *Ind.*, 217.

² *Sedgwick vs. Tucker*, 90 *Ind.*, 271.

[*Compare Spaulding vs. Baldwin*, 31 *id.*, 376. (Holding title deed of defendant in ejectment within the statute.)]

§ 241. *Exhibit not called for by the statute.*—An exhibit furnished in a case where it is not required by the statute—as, for instance, a document which is not the foundation of the action, or not the kind of instrument contemplated—can neither help nor hurt the pleading with which it is furnished.¹

The better opinion, however, is, that where a document not called for by the statute is actually embodied in the pleading, or is annexed to the pleading, and expressly referred to in the body as a part thereof, it must be considered as such upon common law principles.²

¹ *Excelsior Draining Co. vs. Brown*, 38 *Ind.*, 384 ; *Etchison Ditching Asso. vs. Busenback*, 39 *Ind.*, 362 ; *Etchison, etc., Asso. vs. Hills*, 40 *Ind.*, 408 ; *Hamrick vs. Danville, etc., Gravel Road Co.*, 41 *Ind.*, 170 ; *Dobson vs. Duck Pond Ditching Asso.*, 42 *Ind.*, 312. (Articles of draining or ditching associations not called for by the statute in action for assessments or subscriptions to stock, and therefore even though filed, cannot be considered on demurrer.)

Armstrong vs. McLaughlin, 49 *Ind.*, 370 ; *Tindall vs. Wasson*, 74 *Ind.*, 495 ; *Stotsenburg vs. Same*, 75 *Ind.*, 538. (Documents forming source of title.)

Carter vs. Branson, 79 *Ind.*, 15. (*So held* even of an instrument copied into the pleading, but on which the pleading was not founded.)

Knight vs. Flatrock, etc., Co., 45 *Ind.*, 134. (Proceedings for highway.)

Hopper vs. Lucas, 86 *Ind.*, 43 ; *Conwell vs. Conwell*, 100 *Ind.*, 437. (Judgment not a “written instrument” within the statute.)

West. U. Tel. Co. vs. Ferris, 103 *Ind.*, 91. (Telegrams necessary to the defence, but not foundation of it.)

Huseman vs. Sims, 104 *Ind.*, 317. (Schedule and appraisement necessary to sustain claim of exemption for property sold by sheriff under execution ; but not being the foundation of an action for damages for such sale.)

Thurston vs. Boardman, 1 *Wilson (Ind.)*, 433. (Answer justifying under an execution set forth, from which it appeared that the return was imperfect.)

² See § 229.

Contra, *Excelsior Draining Co. vs. Brown*, 38 *Ind.*, 384 ;

Armstrong vs. McLaughlin, 49 *Ind.*, 370; *Carter vs. Branson*, 79 *Ind.*, 15.

§ 242. *False reference to filing*.—A statement in the pleading that a document is made part of it when the law does not require annexing or filing, and in fact the document is not annexed or filed, may be disregarded as surplusage, and will not vitiate the pleading on exception or demurrer.

Lee vs. Lacoste, 3 *La. Ann.*, 223.

§ 243. *Indorsements*.—*Ownership of chose in action*.—Under statutes requiring a copy of an instrument to be filed and referred to in a pleading, furnishing and referring to a copy of the note or other principal instrument, without expressly referring to indorsements copied thereon, does not satisfy the statute in respect to such indorsements, but they must be also referred to.¹

Whether indorsements, assignments, and other transfers necessary only to show plaintiff's right to sue are within the statute, compare the cases below.²

¹ *Sinker vs. Fletcher*, 61 *Ind.*, 276; *Williams vs. Osbon*, 75 *id.*, 287; *Davisson vs. Wilson*, 80 *id.*, 391.

² *Affirmative*—*Mainer vs. Reynolds*, 4 *G. Greene (Iowa)*, 187. (Indorsee suing in indorser's name on non-negotiable note.)

Negative—*Keller vs. Williams*, 49 *Ind.*, 504. (Indorsee against maker.)

Bay vs. Saulspough, 74 *Ind.*, 397. (A sheriff's assignment of a debt sold on execution is not the foundation of a suit on the claim.)

Nelson vs. Myers, 34 *Ind.*, 431. (Legatee's action on note to testator: will not the foundation of the action.)

Day vs. Bowman, 109 *Ind.*, 383; s. c., 10 *North East. Rep.*, 126. (Assignment of attorney's lien not part of foundation of debtor's suit to enjoin enforcement of the lien.)

§ 244. *Demurrer for failure to furnish exhibit.*—In those jurisdictions¹ where the statute is regarded as making the exhibit a part of the pleading, the omission to furnish the exhibit in a case within the statute, or to allege a sufficient excuse for omission,² makes the pleading demurrable,³ or obnoxious to motion.⁴

¹ For the statutes see RECEPTION OF EVIDENCE.

² See § 252, below.

³ This is the rule in Indiana. *Brown vs. State, Brown*, 44 *Ind.*, 222. (Action on bond: complaint alleged that a copy was filed, but none was filed. *Held*, error to overrule demurrer.)

Seawright vs. Coffman, 24 *Ind.*, 414. (Demurrer to answer setting up conditions contained in subscription paper not filed. The action was on the note defendant gave for his subscription.)

Ohio & M. R. Co. vs. Nickless, 71 *Ind.*, 271. (Carrier's allegation of special contract and release, as a defence.)

See also list of States under RECEPTION OF EVIDENCE.

⁴ *Henry vs. Blackburn*, 32 *Ark.*, 445. (Holding that demurrer would not lie.)

Egan vs. Tewksbury, 32 *Ark.*, 43. (Holding that the omission could not avail at the trial, although pleaded by answer, but defendant should have moved.)

In *Burnes vs. Simpson*, 9 *Kans.*, 658, it was held error to sustain a demurrer. KINGMAN, C. J., says: "In States like Indiana, where the code makes the instrument or account on which the pleading is founded a part of the record, the not filing it may well be taken advantage of by demurrer; but in a code like ours such a practice is not logical and ought not to be enforced."

§ 245. *Copy in body of pleading enough.*—Under a statutory provision or rule of court requiring an instrument which is the foundation of the action, or a copy thereof, "to be filed with the complaint," the filing of a complaint in the body of which the instrument is set forth in full, introduced by an appropriate allegation to connect the defendant with it, is sufficient.

Benjamin *vs.* Delahay, 3 *Ill.* (2 *Scam.*), 574.

Colchin vs. Ninde, 120 *Ind.*, 88; s. c., 22 *North East. Rep.*, 94; *Adams vs. Dale*, 29 *Ind.*, 273; *Jones vs. Parks*, 78 *id.*, 537. (Holding allegation that the instrument was part of the complaint, or that it was filed, unnecessary.)
Lamson vs. Falls, 6 *Ind.*, 309.

§ 246. *Exhibit which is mere evidence not noticed on demurrer.*—In those jurisdictions where the statute merely aims at securing the information to the adverse party, and the exhibit is not a part of the pleading, the omission to furnish it does not render the pleading demurrable;¹ and if furnished, the exhibit can neither help² nor hurt³ the pleading on demurrer. Otherwise, in the absence of such a statute, if the exhibit is expressly referred to in the pleading as a part thereof.⁴

¹ *Hannibal & St. J. R. Co. vs. Knudson*, 62 *Mo.*, 569.

(The remedy is by motion to dismiss, or motion to require plaintiff to file. Error to sustain demurrer.)

Calvin vs. State, 12 *Ohio St.*, 60.

² *Blackwell vs. Reid*, 41 *Miss.*, 102.

Marshal vs. Hamilton, 41 *Miss.*, 229.

Deitz vs. Corwin, 35 *Mo.*, 376. (Action on promissory note.)

Dyer vs. Krayner, 37 *Mo.*, 603. (Action on note. No positive allegation of indorsement by payee, but only that D. was his endorsee, "as appears by the endorsements thereon," and the note filed cannot be looked to, to aid averments.)

Johnson vs. Home Ins. Co. (*Wyo.*, 1885), 6 *Pacif. Rep.* 729; s. c., 16 *Ins. L. J.*, 208. (The Court say: "It has been repeatedly held that the copy attached and filed with the pleadings forms no part of the pleading, and that the exhibit will not be looked to on demurrer to the pleading to aid its sufficiency. *Larimore vs. Wells*, 29 *Ohio St.*, 13; *Watkins vs. Brunt*, 53 *Ind.*, 208; *Cairo & Fulton R. R. vs. Parks*, 32 *Ark.*, 131; *Bowling vs. McFarlin*, 38 *Mo.*, 465. . . . The petition alone must state facts constituting a cause of action. If it does not, it must be held bad on demurrer. *City of Los Angeles vs. Signoret*, 50 *Cal.*, 298.

"The Supreme Court of Arkansas has held that a reviewing court will look at an exhibit so as to sustain the ruling of the court below on demurrer when the

exhibit is made a part of the record. *Buckner vs. Davis*, 29 *Ark.*, 444; also *Holman vs. Patterson*, 29 *Ark.*, 357, 362. But I know of no State, save one, in which it has been held that the Court will look to an exhibit to supply the omission of a material allegation in the petition, even though the exhibit can be and is made a part of the petition."

[But see a well-considered decision in *Ward vs. Clay*, 82 *Cal.*, 502; s. c., 23 *Pacific Rep.*, 50, taking a different view.]

s. p., *Bowling vs. McFarland*, 38 *Mo.*, 465. (Motion in arrest.)

* *Pearsons vs. Lee*, 2 *Ill.*, 193. (Exhibit was a contract lacking plaintiff's signature and therefore not mutual. *Held*, error to sustain demurrer. The Court cannot, on demurrer, decide as to the want of mutuality, because the copy set out, not being a part of the pleading, is not before the Court.)

Curry vs. Lackey, 35 *Mo.*, 389. (Petition alleged written agreement to arbitrate difference in value between places exchanged, and written award, and exhibited the two papers, praying that they might be taken as part of it. Demurrer that the statements of the exhibits did not sustain averments of the petition. *Overruled. Held*, correct. Exhibits are no part of the pleading, and cannot make it bad on demurrer.)

Baker vs. Berry, 37 *Mo.*, 306. (Petition averred that payee assigned by indorsement and delivered note to plaintiff, the assignee. Note filed was indorsed to plaintiff by the initials of his Christian name. Demurrer, because no averment in petition that plaintiff was same person to whom note purported to be assigned. Sustained. *Held*, error. Petition was good and in usual form. Assignment shown on the note could not be called in question by demurrer, as it was no part of the pleading.)

Phillips vs. Evans, 64 *Mo.*, 17. (Motion to set aside default in action on bill of exchange on the ground, among others, that the judgment included ten per cent damages on amount of bill of exchange, to which plaintiffs were not entitled. *Overruled. Held*, proper to overrule that ground. Amount of judgment did not exceed amount claimed in the petition, and the bill of exchange filed was no part of the pleading, and cannot be looked to.)

Hall vs. Harrison, 21 *Mo.*, 227. (Petition stated that an authenticated copy of the proceedings which resulted in the decree sued on was filed with it. Objection that the

decree sued on does not show a final recovery of any specific amount. *Held*, that as the petition alleged final recovery of a specific amount, and the transcript of the record annexed to the petition is not a part thereof, it cannot be looked to in order to sustain the demurrer on that ground.)

Bogardus vs. Trial, 2 *Ill.*, 63. (Declaration on note and account. Error to sustain demurrer for misjoinder, because a copy covenant under seal was filed.)

s. P., *Gage vs. Lewis*, 68 *id.*, 604.

Hooker vs. Gallagher, 6 *Fla.*, 351.

* See § 232, ALLEGATION OF DOCUMENT.

§ 247. *Contract not shown to be in writing.*—Under statutes requiring that in an action on a written contract a copy of the contract be furnished as an exhibit, a complaint which pleads a contract without showing it to have been in writing, is not demurrable for not furnishing an exhibit, although the contract be one which the statute of frauds requires to be in writing.

Young Men's C. A. vs. Dubach, 82 *Mo.*, 475. (Specific performance. HENRY, J., says: "A written agreement was not alleged, nor was it necessary to allege that the agreement to sell was in writing. The statute applies to actions grounded upon instruments in writing which are declared upon as such, and was not intended to abolish the rule of pleading which authorizes a plaintiff to declare upon a contract which at common law was valid, though resting in parol, notwithstanding a statute subsequently requires such contract to be in writing.")

n Harper vs. Miller, 27 *Ind.*, 277, however, the contrary was conceded as to contracts which can only be valid when in writing; but it was held that the contract there sued on being for the sale of personal property, the statute might be satisfied by part payment or delivery; and the complaint alleging the contract is not demurrable under statute of frauds, as, if in parol, it might be validated by part payment or by delivery.

§ 248. *Reference to exhibit; and identifying.*—In those jurisdictions where the statute imperatively requires filing, and in effect makes the exhibit part of the pleading, it must be referred to in the pleading as such;¹

merely filing it, with nothing in the pleading to identify it, does not save the pleading from demurrer.²

But omission to mark it as an exhibit, or to refer to it by any particular number or other mark, is not fatal, if it is so referred to as to be identified.³

The omission to refer to it may be cured by amendment.⁴

¹ Price *vs.* Grand Rapids & I. R. Co., 13 *Ind.*, 58.

² Stafford *vs.* Davidson, 47 *Ind.*, 319 ; Rogers *vs.* State, 78 *id.*, 329.

³ Whitworth *vs.* Malcomb, 82 *Ind.*, 454 ; Wall *vs.* Galvin, 80 *id.*, 449.

Mere leaving the exhibit in the clerk's office is not sufficient filing. Lamson *vs.* Falls, 6 *Ind.*, 309.

But if left with a due request to file, the mistake of the clerk in respect to filing should not prejudice the party. May *vs.* Wolvington, 69 *Md.*, 117 ; s. c., 14 *Atl. Rep.*, 706 ; 12 *Cent.*, 908.

⁴ *Dictum* in Rogers *vs.* State, 78 *Ind.*, 329.

§ 249. *Appropriate words of reference.*—The exhibit is sufficiently described and identified by adding after appropriate allegations as to the original: “a copy of which is annexed hereto,” [*or, if the statute requires filing, “is filed herewith”*], without adding “and made a part hereof.”

Carper *vs.* Kitt, 71 *Ind.*, 24 ; Lent *vs.* Martin, 75 *id.*, 228 ; Blackburn *vs.* Crowder, 108 *id.*, 238.

Dunkle *vs.* Nichols, 101 *Ind.*, 473. (A complaint stating “the said note is in the words and figures following, to wit (here insert ‘Exhibit A,’ which is filed herewith, and made a part hereof),” sufficiently refers to the copy filed, although not the most approved method.)

Totten *vs.* Cooke, 2 *Metc. (Ky.)*, 275. (Allegation that defendant is “indebted to the plaintiff in the sum of of \$779.78, due by note herewith filed,” was *held* sufficient to make the note a part of the petition.)

§ 250. — *Several counts.*—Where an exhibit is to be furnished in connection with several counts or defences,

furnishing one copy is enough, but it should be referred to in each count or defence.¹

But if there are several instruments identical in form, a copy of each must be given ;² except perhaps where they are too numerous—as in the case of bank notes of the same denomination—to be all presented without inconvenience to the Court.³

¹ *Maxwell vs. Brooks*, 54 *Ind.*, 98 ; *State, Wright vs. Brown*, 80 *id.*, 425 ; *Scotten vs. Randolph*, 96 *id.*, 581.

² *Hochstedler vs. Hochstedler*, 108 *Ind.*, 506. (Holding, however, that it is not necessary to add the words “and made a part thereof” in every successive count.)

³ *Johnson School Tp. vs. Citizens' Bank*, 81 *Ind.*, 515. (Holding that it is not enough to say that one was an exact copy of the other.)

⁴ *Conwell vs. Hill*, 14 *Ind.*, 131.

§ 251. *What omissions in pleading supplied by exhibit.*

—An exhibit, even when effectually made a part of the pleading,¹ does not dispense with such allegations as are necessary to show the existence of the instrument copied,² and to connect it with the parties by appropriate allegations showing by whom and to whom it was given.³ But a fact appearing by the exhibit (if the instrument be one which binds the party against whom it is pleaded)⁴ dispenses with the necessity of alleging the fact formally in the pleading,⁵ and supplies a defective or incomplete allegation.⁶ If the fact appearing in the exhibit be unfavorable to the pleader, its appearance there will override a formal allegation to the contrary in the pleading.⁷

¹ For the statutes as to what jurisdictions have this rule see DEFINING THE ISSUES.

² *Hill vs. Barrett*, 14 *B. Mon. (Ky.)*, 83. (Plaintiff filed contract, and referred to it, and merely alleged a breach by defendant, without the facts constituting the cause of action. Demurrer sustained. MARSHALL, J., said: “The petition must contain in its own body, and not

merely by reference to another paper, a statement of the facts constituting the cause of action.")

* *Dodd vs. King*, 1 *Metc. (Ky.)*, 430. (Notes payable to a third person. Plaintiff did not allege assignment to himself, and so did not show his right to sue. The notes filed showed assignment. Judgment by default reversed.)

* *Nauvoo vs. Ritter*, 97 *U. S.*, 389. (*Held*, on demurrer to plea tendering issue as to city's authority to issue bonds, that the bonds annexed to the declaration, reciting the facts showing authority, were part of the pleading. Demurrer to plea therefore sustained.)

[*Contra*, *City of Los Angeles vs. Signoret*, 50 *Cal.*, 298. (Holding recitals of jurisdictional facts in notice and claim of lien for assessment did not dispense with allegation of those facts in the complaint.)

See note to § 228 (allegation of document.)

* *Ward vs. Clay*, 82 *Cal.*, 502; s.c., 23 *Pacif. Rep.*, 50. (Holding that the statute requiring verified denial of written instruments implies a sanction of the practice of annexing a copy as an exhibit; and that a copy so annexed and referred to may be considered by the Court at any rate for the purpose of ascertaining what is meant by the reference, and what the form of the instrument.)

Crandall vs. First Nat. Bank, 61 *Ind.*, 349. (Variance not ground of demurrer. Here the copy of note filed showed it payable at "Citizen's State, of," etc. Complaint alleged it to be payable at "Citizen's State Bank, of," etc. Demurrer overruled because complaint stated good cause of action whether note was payable at a bank or not, and therefore no ground of demurrer. Defendant might have moved to strike out the allegation. The copy filed controls.)

s. p., *Cotton vs. State*, 64 *Ind.*, 573. (Action on bond.)

Watson C. & M. Co. vs. Casteel, 73 *Ind.*, 297. (Copy of lease filed with complaint. Demurrer to complaint, for want of facts sufficient, etc., overruled. *Held*, that if there is material variance between the allegations and the lease, "the copy will control and will be presumed to be right until the contrary is shown" [citing authorities.]

Furgison vs. State, 4 *G. Greene (Iowa)*, 302. (Demurrer to petition, because not averring that bond was accepted by a competent officer, properly overruled; because the bond, a copy of which was filed, showed that it was taken by a competent officer, and that was sufficient.)

West vs. Hayes, 104 *Ind.*, 251, 3 *North East. Rep.*, 932. (Failure to allege that the note sued on was due at the

commencement of the suit cured by the fact that the copy filed with the complaint, under the statute requiring such filing, supplied the omission.)

s. p., *Burton vs. White*, 1 *Bush* (*Ky.*), 9.

Cooper vs. Blood, 2 *Wisc.*, 62. (To common counts with copy of note, defendant pleaded extension of time of payment. Plaintiff replied that he never made agreement "extending the time of payment of the note in the said declaration mentioned, or any part thereof." Demurrer to reply, on ground that it was a departure from the declaration, *held* properly overruled, because the note was a part of the declaration, and the reply denying extension of payment did not, therefore, depart from the declaration.)

Blossom vs. Ball, 32 *Ind.*, 115. (Allegation of lost contract made with plaintiff and her husband: exhibit purporting to be signed by plaintiff and defendant only. *Held*, that the copy would control the allegation; and, as signature by the husband was not essential, the complaint was good on demurrer.)

D'Inwilliers vs. New Orleans, 5 *Rob. (La.)*, 123. (Promissory notes misdescribed, the notes being annexed and being sufficient.)

Mercer vs. Herbert, 41 *Ind.*, 459. (Answer alleged substantially, and copied an agreement under which the note was to be paid or partly paid by application of any difference between the par value and actual value, at a given date, of certain stock sold by defendant to plaintiff. Demurrer that the answer did not allege at what price the stock was sold sustained. *Held*, error. The defence was based wholly on the contract, a copy of which was given, and referred to as such, and which spoke for itself as a part of the pleading, and the substance need not be alleged.)

[According to some authorities this rule may be restricted to the terms and nature of the instrument, as distinguished from mere recitals. See § 228, ALLEGATION OF INSTRUMENT.]

• Thus a description, in the exhibit, of the premises or subject of the contract, aids an omission in the description in the pleading. *Duncan vs. Elam*, 1 *Rob. (La.)*, 135. (Here, on an application for an order of seizure and sale of slaves, the mortgage being annexed to the petition, which concludes with a prayer that the mortgaged slaves be seized and sold, all the slaves mentioned in the mortgage may be included in the order of sale, though a part of them are not named in the petition.)

Parker vs. Feas, 79 *Ind.*, 235. (Copy of mortgage filed

and made part of each paragraph of complaint. *Held*, error to sustain demurrer on the ground that the description of the land in the mortgage was so uncertain as to avoid the mortgage: because the allegations differed somewhat from the mortgage filed, and the description in the mortgage was not so uncertain as to avoid the mortgage, and the exhibit should control the allegations.)

¹ *McDonough vs. Kane*, 75 *Ind.*, 181. (Statements in the complaint repugnant to the legal effect of the contract filed and made part of the complaint are no cause for demurrer.)

§ 252. *Excuses for not furnishing exhibit.*—The omission to comply with the statute requiring an instrument sued on, etc., to be made an exhibit by annexing or filing a copy, is excused by an allegation in the pleading that the adverse party has wrongfully obtained and retains possession of the document.¹

So also by an allegation that the instrument has been deposited by the parties jointly in the private custody of a third person,² especially if the depositary refuses to surrender it or to give a copy.³

But it is not an excuse to allege that the original is on file in a public office,⁴ even if it be also alleged that the officer refuses to surrender it,⁵ for it is subject to public inspection, and the pleader may furnish a copy.

It is a sufficient excuse for not complying with the statute to allege that the original has been lost, and cannot be found, although diligent search has been made.⁶

¹ *Bank of Commerce vs. Hoeber*, 8 *Mo. App.*, 171.

Otherwise, perhaps, if the possession is not wrongful, and request and refusal are not alleged. *Dull vs. Bricker*, 76 *Pa. St.*, 255.

[But in *Larimore vs. Wells*, 29 *Ohio St.*, 13, it was held that an allegation of such excuse is immaterial, and tenders an immaterial issue. It makes no difference, as reason for not annexing or filing notes, whether defendant's possession was wrongful or rightful.]

² *Bowling vs. Hax*, 55 *Mo.*, 446. (But a mere allegation

that it is in the possession of a third person, by whom it is wrongfully withheld, was *held* not sufficient in *Hook vs. Murdoch*, 38 *Mo.*, 224, the Court saying that the statute requires filing unless the petition shows "loss or destruction.")

³ *Wells vs. Sutton*, 85 *Ind.*, 70.

⁴ *Conwell vs. Hill*, 14 *Ind.*, 131. (Bank notes on file in the auditor's office.)

⁵ *Anderson School Tp. vs. Thompson*, 92 *Ind.*, 556. (Error to overrule demurrer.)

But *contra*, *State, Wolf vs. Engelke*, 6 *Mo. App.*, 356. (Holding that when a bond sued on is on file in another court, the statutory provision as to filing does not apply, and failure to file is no ground for dismissal.)

⁶ *Boots vs. Canine*, 58 *Ind.*, 450.

Ryan vs. Bank of Nebraska, 10 *Neb.*, 524; *Blasingame vs. Blasingame*, 24 *Ind.*, 86. (Holding also that an affidavit to the loss, etc., such as is required in equity practice, is not necessary under the Code.)

§ 253. *Amended pleading*.—The omission to comply with the statute in an amended pleading is not aided by the fact that a copy of the instrument was filed with the original pleading, for that is superseded by the amendment.

McEwen vs. Hussey, 23 *Ind.*, 395.

Holdridge vs. Sweet, 23 *Ind.*, 118.

§ 254. *State practice in U. S. Court*.—State statutes and rules of court requiring documents pleaded to be furnished or filed, apply in the United States Circuit and District Courts in the same State in civil causes other than in equity, admiralty, and *in rem* for forfeiture.

This follows from *Bell vs. Mayor, etc.*, of Vicksburg, 23 *How. (U. S.)*, 443. (So holding as to sworn denials; and from the principles stated in §§ 27–31.)

DULY. [See also AUTHORITY, CONTRACTS, above, and JUDGMENTS, below.]

§ 255. *An issuable allegation*.—It has been held at common law,¹ and in equity,² and in some cases under the

New Procedure,³ that an allegation that a thing was "duly" done, without stating particulars, is a mere conclusion of law and insufficient on demurrer.

But that if the allegations of the pleading show what the requisite particulars are, then an allegation that the act was "duly" done sufficiently implies that those requisites were fulfilled.⁴

Hence it was also held, in cases where the general public law of which the Court is bound to take notice prescribed all the requisites, that this short allegation was enough without stating the particulars required by law.⁵ And an allegation that it was done according to law, or pursuant to the statute, was equally sufficient.⁶

It is the better opinion, at least under the New Procedure, that an allegation that a thing was "duly" done (if no particulars implying the contrary be added) is, on demurrer, a sufficient allegation as to the doing of it, whenever the particulars are prescribed by law.⁷ There may be an exception where it was the official or judicial act of a third person not having general jurisdiction; and even there it is made sufficient by the usual provision of the codes as to pleading a "judgment or other determination," provided the existence of the necessary proceeding is shown, and the tribunal or officer designated.

¹ *Gillett vs. Fairchild*, 4 *Den.* (N. Y.), 80.

Beach vs. King, 17 *Wend.*, 197.

² *Cruger vs. Halliday*, 11 *Paige*, 320; rev'g 3 *Edw. Ch.*, 565; *Story's Eq. Pl.*, 251.

³ *Secor vs. Pendleton*, 47 *Hun* (N. Y.), 281; *Forest vs. Mayor, etc., of N. Y.*, 13 *Abb. Pr.*, 350; *Dayton vs. Connah*, 18 *How. Pr.* (N. Y.), 327.

s. p., *Am. Mut. Aid Soc. vs. Helburn*, 85 *Ky.*, 1; s. c., 7 *Am. St.*, 571; *Hayden vs. Bohlson*, 7 *Ky. Law Rep.*, 749; *Gull River Lumber Co. vs. Keefe* (*Dak.*), 41 *North West.*, 743; *Myers vs. Machado*, 6 *Abb. Pr.* (N. Y.), 198; s. c., 14 *How. Pr.*, 149; 6 *Duer*, 678; *Carter vs. Koezley*, 9 *Bosw.* (N. Y.), 583; s. c., 14 *Abb. Pr.*, 147.

⁴ *Dictum* in *Cruger vs. Halliday*, 11 *Paige*, 320.

- * See § 140, APPEARANCE. S. P., *Polly vs. Saratoga, etc., R. Co.*, 9 *Barb. (N. Y.)*, 449.
 [*Contra*, *Trow City Directory vs. Curtin*, 36 *Fed. Rep.*, 829; *Roda vs. Alameda County*, 52 *Cal.*, 350.]
- * *Burdett vs. Greer*, 8 *Pick. (Mass.)*, 108; *Sewall vs. Valentine*, 6 *id.*, 276.
- * *Robertson vs. Perkins*, 129 *U. S.*, 233; s. c., 32 *Law ed.*, 686; 9 *Supm. Ct. Rep.*, 279.
Rubush vs. State of Indiana, 112 *Ind.*, 107; s. c., 11 *West. Rep.*, 663; 13 *North East. Rep.*, 877.
B. C. R. & M. R. Co. vs. Stewart, 39 *Iowa*, 267; *Barthol vs. Blakin*, 34 *id.*, 452.
- * *Sanborn vs. Chamberlin*, 101 *Mass.*, 409.
Hoag vs. Mendenhall, 19 *Minn.*, 335; *Webb vs. Bidwell*, 15 *id.*, 479.
Becker vs. Washington, 94 *Mo.*, 375; s. c., 13 *West. Rep.*, 589; s. c., 7 *South. West. Rep.*, 291.
- Schluter vs. Bowery Savings Bk.*, 117 *N. Y.*, 125; *Lorillard vs. Clyde*, 86 *id.*, 384; *People ex rel. Crane vs. Ryder*, 12 *id.*, 433; *People ex rel. Hawes vs. Walker*, 2 *Abb. Pr. (N. Y.)*, 421; s. c., 23 *Barb.*, 304; *People vs. Mayor of N. Y.*, 8 *Abb. Pr. (N. Y.)*, 7; s. c., 28 *Barb.*, 240; *French vs. Willett*, 10 *Abb. Pr. (N. Y.)*, 99; s. c., 4 *Bosw.*, 649; *Platt vs. Stout*, 14 *Abb. Pr. (N. Y.)*, 178; *Bates vs. Merrick*, 2 *Hun (N. Y.)*, 568; mem. s. c., 5 *Supm. Ct. (T. & C.)*, 701; *Horne vs. Wood*, 15 *Barb. (N. Y.)*, 371; *Fowler vs. N. Y. Indemnity Ins. Co.*, 23 *Barb. (N. Y.)*, 143; *Phelps vs. Platt*, 50 *Barb. (N. Y.)*, 430; *McCorkle vs. Herrman*, 22 *State Rep.*, 519; s. c., 5 *N. Y. Supp.*, 881; *Cheney vs. Fisk*, 22 *How. Pr. (N. Y.)*, 236.
- s. p., *Burns vs. People*, 59 *Barb. (N. Y.)*, 531; *Gibson vs. People*, 5 *Hun (N. Y.)*, 542. (Holding it sufficient even in indictment.)
- Trustees of School Sec. 16 vs. Odlin*, 8 *Ohio St.*, 293; *Trustees of Ohio State Univ. vs. Ayer*, 19 *Weekly Cinn. L. Bull.*, 11, 13.
- [Clearly, where the allegation would be sufficient on demurrer without the word "duly," the insertion of that word should not be held to vitiate.]

DUTY.

§ 256. *A mere conclusion.*—An allegation that it was the duty of a person to do an act is a mere conclusion of law, and insufficient without a statement of the facts.¹

The relation,² contract,³ or usage⁴ relied on to raise

the duty, or the facts relied on to bring the case within a statute⁵ raising the duty, must be pleaded sufficiently to show the duty. This being done, adding that it therefore became the duty, etc., is superfluous,⁶ but does not vitiate.⁷

¹ *City of Buffalo vs. Holloway*, 7 *N. Y.*, 493 (the leading Am. case).

² *Chitt. Pl.*, 16 *Am. ed.*, 477 ; citing *Brown vs. Mallet*, 5 *C. B. (M. G. & S.)*, 599, 615 ; 17 *L. J. C. P.*, 227.

City of Norwich vs. Breed, 30 *Conn.*, 535, 550. (Holding the rules the same of a duty to the public as of private duty.)

Mayor, etc., of Newark vs. Stout (*N. J. L.*, 1889), 18 *Atl. Rep.*, 943, 946.

² *Taylor vs. Atlantic Mut. Ins. Co.*, 2 *Bosw. (N. Y.)*, 106. (Duty to raise a sunken vessel.)

³ *City of Buffalo vs. Holloway*, above. (Duty of contractor to guard against injury.)

Casey vs. Mann, 5 *Abb. Pr.*, 91. (Duty of lessor to repair.)

McCune vs. Norwich City Gas Co., 30 *Conn.*, 521. (Duty of gas company to furnish applicant.)

⁴ The better opinion is that an allegation that by the usage of the trade or place, etc., it was the duty of, etc., is a sufficient allegation of the usage, on demurrer. *Gregory vs. Oaksmith*, 12 *How. Pr. (N. Y.)*, 134. *Contra*, *Kleekamp vs. Meyer*, 5 *Mo. App.*, 444.

⁵ *Williams vs. Inhabitants of Taunton*, 82 *Mass.*, 288.

Smith vs. Wright, 27 *Barb. (N. Y.)*, 621 ; rev'g 24 *id.*, 170 ; *Brennan vs. Lachat*, 14 *Daly*, 197 ; s. c., 6 *N. Y. State Rep.*, 278 ; aff'g 5 *id.*, 882.

⁶ *White vs. Snell*, 9 *Pick. (Mass.)*, 16.

⁷ *Brown vs. Mallet* ; *City of Buffalo vs. Holloway* (both above cited).

EASEMENT.

§ 257. *Ground of right.*—In pleading an easement it is not essential to state details as to how it was acquired.

Coolidge vs. Learned, 25 *Mass. (8 Pick.)*, 504 ; s. p., *Blake vs. Everett*, 83 *Mass.*, 248.

French vs. Martin, 24 *N. H.*, 440 ; s. c., 57 *Am. Dec.*, 294. [*Compare Brief on the Facts*, § 408.]

ELECTION (OF RIGHTS AND REMEDIES).

§ 258. *Under optional contract.*—A party relying, for affirmative relief, on a right of election given him by an express option reserved in a contract, must expressly allege and prove the election made by him.

Post vs. Springsted, 49 *Mich.*, 90; *Howard vs. Farley*, 3 *Robt. (N. Y.)*, 599.

[As to Election under special contracts, etc, see Note in 23 *Abb. N. C.*, 145.]

FOREIGN LAW. [See also STATUTES.]

§ 259. General allegation.

§ 260. Laws of sister State.

§ 259. *General allegation.*—It is the better opinion that an allegation of foreign law by its legal effect is sufficient on demurrer.

Hanley vs. Donohue, 116 *U. S.*, 1, 7. (Allegation that “by the law and practice of Pennsylvania the judgment so rendered against the two defendants aforesaid is in that State valid and enforceable against Charles Donohue and void as against John Donohue,” sufficient on demurrer.)

Berney vs. Drexel, 33 *Hun*, 34; reaff'd on reargument in *id.*, 419, and aff'g 63 *How. Pr.*, 471. (Allegation “that under and by virtue of the laws of France” the title to the property in question vested immediately upon testator's decease in the plaintiffs, is an allegation of fact, not of law, and sufficient.)

Savings Association of St. Louis vs. O'Brien, 51 *Hun*, 45; s. c., 20 *State Rep.*, 826; 3 *N. Y. Supp.*, 764. (Complaint setting forth statute of sister State, and adding that by its provisions as defined, construed and enforced by the Courts of such State, when any railroad company of such State becomes dissolved any creditor may have an action, etc. Held, that this allegation as to the meaning of the statute was admitted by the demurrer.)

s. p., *Schluter vs. Bowery Sav'gs Bk.*, 117 *N. Y.*, 125. (Allegation that said surrogate “had jurisdiction, and was duly authorized by the laws of said State,” etc., sufficient at trial.)

[*Contra*, *McLeod vs. Conn. & Pass. R. Co.*, 58 *Vt.*, 727;

s. c., 7 *Eastern Rep.*, 105. (Holding it not enough on demurrer to allege that by the law of, etc., it was the duty of defendant, etc.; but the law must be set out.) s. p., *Throop vs. Hatch*, 3 *Abb. Pr.*, 23.]

§ 260. *Laws of sister State.*—A *State Court* may take judicial notice of the laws of a sister State;¹ and ought to do so when a federal question is raised thereon, for the Supreme Court of the United States is then the Court of last resort, and would be bound to do so on error or appeal.²

The *United States Courts* are bound to take judicial notice of the laws not only of the State in which they are sitting, but also of all the others.³

Paine vs. Schenectady Ins. Co., 12 *R. I.*, 440 ; s. c., 5 *Reporter*, 221. (Rule that appeal pending does not nullify effect of adjudication.)

Hobbs vs. Memphis, etc., R. Co., 9 *Heisk. (Tenn.)*, 873. (Judicial notice taken of law of sister State, giving action for personal injuries.)

State of Ohio vs. Hinchman, 27 *Pa. St.*, 479. (Jurisdiction of Probate Court to entertain *habeas corpus*.)

Fourth Nat'l Bk. vs. Francklyn, 120 *U. S.*, 747 ; *Owings vs. Hull*, 9 *Pet. (U. S.)*, 607 ; *Newberry vs. Robinson*, 36 *Fed. Rep.*, 841.

The rule is the same though the action were commenced in a State court where the complaint was demurrable for not pleading the statute. *Breed vs. Northern Pacif. R. Co.*, 35 *Fed. Rep.*, 642.

FORMER RECOVERY. [See also JUDGMENT.]

§ 261. *Disclosed as a bar.*—A count is bad on demurrer if it shows a former recovery which has merged the cause of action and bars the second action.

Edson vs. Girvan, 29 *Hun (N. Y.)*, 422, 425. (Otherwise of a separate count, or a supplemental pleading, stating a former recovery.)

FRAUD. [See also CONFEDERACY, COLLUSION, INTENT.]

§ 262. General allegation not enough.

263. Allegation of evidence.

§ 264. What details necessary.

265. Intent.

§ 262. *General allegation not enough.*—At Common Law,¹ in Equity,² and under the New Procedure,³ a general allegation of fraud, with no particulars, is not sufficient even on demurrer.

The reason is, that even where fraud is a conclusion of fact, it is a conclusion to be drawn by the jury or the Court, not a fact to which a witness can testify directly, by that word; and therefore the facts which constitute it and must be proved in order to establish it must be alleged.

¹ Ward *vs.* Luneen, 25 *Ill. App.*, 160.

Connor *vs.* Dundee Chem. Works, 50 *N. J.*, 257; s. c., 11 *Centr. Rep.*, 222, citing Lord *vs.* Brookfield, 8 *Vroom*, 552.

Pearce *vs.* Watkins, 68 *Md.*, 534; s. c., 12 *Centr. Rep.*, 127; s. c., 13 *Atl.*, 376.

Keller *vs.* Johnson, 11 *Ind.*, 337.

Otherwise in a merely responsive plea at common law. *Id.*; 1 *Chitt. Pl.*, 16 *Am. ed.*, 608.

Evans *vs.* Stone, 80 *Ky.*, 78.

² Van Weel *vs.* Winston, 115 *U. S.*, 228; s. c., 29 *Law. ed.*, 384, 6 *Supm. Rep.*, 22; United States *vs.* Atherton, 102 *U. S.*, 372; Moss *vs.* Riddle, 5 *Cranch (U. S.)*, 351.

[Compare *contra*, Christmas *vs.* Russell, 5 *Wall.*, 290.]

Penny *vs.* Jackson, 85 *Ala.*, 67; s. c., 4 *South. Rep.*, 720.

Howard *vs.* Pensacola, etc., R. Co., 24 *Fla.*, 561; s. c., 5 *South. Rep.*, 356.

Marsh *vs.* Sheriff (*Md.*, 1888), 12 *Centr. Rep.*, 887; s. c., 14 *Atl.*, 664.

McGuire *vs.* Van Buren, Circ. Judge, 69 *Mich.*, 593; s. c., 14 *West. Rep.*, 187; s. c., 37 *North West. Rep.*, 568.

Messer *vs.* Stover, 79 *Me.*, 512, 519; s. c., 5 *New Engl. Rep.*, 238, 11 *Atl.*, 275.

Smith's Admr. *vs.* Wood, 42 *N. J. Eq.*, 563; s. c., 9 *East. Rep.*, 178.

Southall *vs.* Farish, 85 *Va.*, 403; s. c., 1 *L. R. A.*, 641; s. c., 7 *South East. Rep.*, 534.

³ Plummer *vs.* Brown, 70 *Cal.*, 544; s. c., 12 *Pacif. Rep.*, 464.

Miller *vs.* Powers, 119 *Ind.*, 79; s. c., 21 *North East. Rep.*, 455.

Mills vs. Collins (Iowa, 1885), 25 *North East. Rep.*, 109, 111; *Kerr vs. Steman*, 72 *Iowa*, 241; s. c., 33 *North West. Rep.*, 654.

Tepvel vs. Saunders County Bk., 24 *Nebr.*, 815; s. c., 40 *North West.*, 415.

Wood vs. Amory, 105 *N. Y.*, 278; *Kohn vs. Goldman*, 76 *N. Y.*, 284.

Great Western Despatch Co. vs. Glenney (*Hamilton Co. Dist. Ct., O.*), 10 *Am. L. Rec.*, 572.

Supervisors of Kewanee Co. vs. Decker, 30 *Wisc.*, 624.

§ 263. *Allegation of evidence.*—An allegation of evidence of fraud is not sufficient if there is nothing to show that fraud is imputed as a ground of relief constituting a part of the pleader's case.

Warner vs. Armstrong, Receiver (Oct. 20, 1888), 4 *Railway and Corporation Law Journal*, 367. (Action for injunction.)

s. p., *Fehlberg vs. Cosine*, 5 *N. Eng.*, 763, 16 *R. I.*, 162; s. c., Index BB, 131, 13 *Atl.*, 110. (Suit to reform a written contract: mistake not made out. Bill was dismissed because it did not, as the Court construed its narrative, allege fraud.)

Davy vs. Garrett, 7 *Ch. D.*, 489; *Smith vs. Kay*, 7 *H. of L. Cas.*, 763.

§ 264. *What details necessary.*—The rule that the facts constituting fraud must be alleged, does not require a detail of circumstances. It is enough if the misrepresentation, the defendant's knowledge, and the plaintiff's ignorance and reliance are alleged in an issuable form, though without setting forth all the evidence which may be adduced to prove them.

United States vs. Bell Telephone, 128 *U. S.*, 315.

Cowin vs. Toole, 31 *Iowa*, 513.

Place vs. Minster, 65 *N. Y.*, 89, 99. (Opin. of Prof. DWIGHT as Comr. at p. 99 as to equity, at p. 102 as to common law.)

§ 265. *Intent.*—Actual fraud is not sufficiently alleged unless it appears from the allegations that there was an intent to deceive.

Bartholomew *vs.* Bentley, 15 *Ohio*, 659.

Zabriskie *vs.* Smith, 13 *N. Y.*, 322; Morrison *vs.* Lewis, 49 *N. Y. Super. Ct. (J. & S.)*, 178; Coyle *vs.* Nies, 6 *N. Y. State Rep.*, 194; Barber *vs.* Morgan, 51 *Barb. (N. Y.)*, 116; Morse *vs.* Switz, 19 *How. Pr. (N. Y.)*, 275; Ad-dington *vs.* Allen, 11 *Wend. (N. Y.)*, 375.

[See INTENT, below.]

Intent or a reckless misstatement must be alleged. Fur-nas *vs.* Friday, 102 *Ind.*, 129. Compare Derry *vs.* Peek, 14 *App. Cas.*, 337.

Allegation of injury suffered "by reason of the frauds" of defendant, wholly insufficient, Knapp *vs.* City of Brooklyn, 97 *N. Y.*, 520, *aff'g* 28 *Hun*, 500.

HEIR.

§ 266. *General allegation.*—An allegation that one person was the sole heir of another is a conclusion of law, and if the facts of exclusive near relationship are not stated, is insufficient.

Montgomery *vs.* White, 10 *Ky. L. Rep.*, 905; s. c., 11 *South West.*, 10. (The Court say he should have alleged and proved that there were no nearer relatives entitled to take.)

[*Contra*, in a declaration against an heir on an obligation of his ancestor, 2 *Chitt. Pl.*, 16 *Am. ed.*, title HEIRS, etc.]

[Compare St. John *vs.* Northrup, 23 *Barb. (N. Y.)*, 25, holding such an allegation sufficient on the trial. s. p., Wainman *vs.* Hampton, 20 *N. Y. Weekly Dig.*, 68.]

ILLEGALITY.

§ 267. Disclosure of illegality on § 269. Reference to statute.
pleader's part. 270. Foreign law.

268. Form of allegation of illegal- 271. Question left in doubt.
ity.

§ 267. *Disclosure of illegality on pleader's part.*—A complaint is bad on demurrer for insufficiency if it shows on its face that plaintiff's claim is illegal.¹

But if the allegation relied on as showing the illegality is not material [i.e., not essential],—as where a contract sued on is stated as having been made on a day which fell on a Sunday,—the demurrer should not be

sustained; for the pleader could establish his case by proving another day, and the variance would be immaterial.²

¹ *Dancy vs. Phelan*, 82 *Ga.*, 243.

Western Un. Tel. Co. vs. Yopst, 118 *Ind.*, 248; s. c., 3 *L. R. A.*, 224, 20 *North East.*, 222.

Galland vs. Rosenfeld, (*N. Y. Supm. Ct.*), *N. Y. Daily Reg.*, June 28, 1876 (not reported).

² *Amory vs. McGregor*, 12 *Johns. (N. Y.)*, 287.

Contra, see *Western Un. Tel. Co. vs. Yopst* (*above cited.*)

§ 268. *Form of allegation of illegality.*—A general allegation that an act or transaction was illegal; or was illegal, unauthorized and void, or was contrary to statute; or not according to law; or the like,—without stating facts necessary to show illegality,—is a mere conclusion of law, and not sufficient on demurrer.¹

If sufficient facts are alleged, the omission to add a formal characterization of the result as illegal,² or even inappropriately characterizing it as a fraud,³ will not vitiate.

¹ *Dickson vs. Burk*, 6 *Ark.*, 412 (*dictum*).

² *Hedges vs. Doem*, 72 *Cal.*, 520; s. c., 14 *Pacif. Rep.*, 133.

Pearce vs. Watkins (*Md.*, 1888), 12 *Centr. Rep.*, 127; s. c., 13 *Atl. Rep.*, 376.

Griggs vs. City of St. Paul, 9 *Minn.*, 246.

Swart vs. Boughton, 35 *Hun (N. Y.)*, 281.

[*Contra*, *Higgins vs. Pelton*, 4 *Cinn. L. Bul.*, 751.]

Sprague vs. Parsons, 14 *Abb. N. C. (N. Y.)*, 320, *aff'd* as to this point in 11 *Civ. Pro. R.*, 17; *Clark vs. Bowe*, 60 *How. Pr. (N. Y.)*, 99; *Smith vs. Lockwood*, 13 *Barb. (N. Y.)*, 209, 216.

Rutter vs. Henry, 21 *Ohio St.*, 129; s. c., 20 *North East. Rep.*, 334; *Pelton vs. Bemis* (*Ohio*, 1886), 15 *Cinn. Weekly L. Bul.*, 169.

³ *Roberts vs. Mathews*, 77 *Ga.*, 458. (Conceding that greater strictness is required in suing to set off usury or recover back usurious payments.)

Handy vs. St. Paul Globe Pub. Co., 41 *Minn.*, 188; s. c., 4 *L. R. A.*, 466; 29 *Centr. L. J.*, 171; 42 *N. W.*, 872.

s. p., *Peck vs. Doran & Wright Co. (Limited)*, 46 *Hun*

(*N. Y.*), 454. (Illegality of wagering contract held sufficiently shown by describing the course of dealing.)
Nichols vs. Lumpkin, 51 *N. Y. Super. Ct. (J. & S.)*, 88.
 2 *Chitt. Pl.*, 16 *Am. ed.*, 402, saying: "In a plea of illegality the plaintiff's participation in the illegality must be clearly shown; *Pellecat vs. Angell*, 2 *Cr. M. & R.* 311; but it is not necessary, after showing the illegality, to aver that there was no other consideration for the contract; *Davis vs. Holding*, 1 *M. & W.*, 159."

* *Faircloth vs. De Leon & Bro.*, 81 *Ga.*, 158.

§ 269. *Reference to statute.*—If the illegality depends on a statute, it is not necessary to refer to the statute (unless it be private, local or foreign); for the Court must take judicial notice of it.

Cassard vs. Hinman, 1 *Bosw. (N. Y.)*, 207, aff'g 14 *How. Pr.*, 84.

1 *Chitt. Pl.*, 16 *Am. ed.*, 509. (Sunday law: citing *Peate vs. Dicken*, 1 *Cr. M. & R.*, 422, 427.)

§ 270. *Foreign law.*—A pleading stating a transaction which according to our law is illegal, is demurrable notwithstanding an allegation that it was authorized by the law of another State where the transaction in part occurred, unless the facts showing that the transaction was such as to be governed by the law of such other State are also alleged.

Thatcher vs. Morris, 11 *N. Y.*, 437. (Action for lottery prize drawn in Maryland, by the law of which the lottery was authorized. The Court, per W. F. ALLEN, J., says: "The Courts cannot, in the absence of an averment to that effect, for the purpose of upholding a contract conceded to be immoral and declared illegal, presume that it was made in some other State or county in which such contracts are still tolerated. Neither is it a matter of defence, to be alleged by the defendant, that it was made within the State, and is, therefore, illegal. The legality and validity of the agreement, and the consequent liability of the defendant, are to be shown by the plaintiff by proper averments in the complaint.")

[As to pleading foreign law see §§ 259, 260.]

§ 271. *Question left in doubt.*—If, discarding mere conclusions of the pleader, all the facts alleged as constituting illegality are consistent with lawfulness, a demurrer should not be sustained on the ground of illegality.

[This appears to be the principle which controls. See the following cases, where, however, the principle is not directly discussed.]

Donovan vs. Compagnie Générale Transatlantique (*Sp. T.*, 1875), 39 *N. Y. Super. Ct. (J. & S.)*, 519. (The defendant should be held to clear and positive averments. Action against a carrier for non-delivery of a certain case of goods: answer that plaintiff delivered baggage and merchandise to the carrier at the time alleged, with the intention of its being smuggled, and that on arrival she did smuggle, etc. *Held*, the averment was defective in that it did not allege that the particular case in question was shipped with such intent. Motion to strike out. VAN VORST, J., said: "In pleading defences of this character, to avoid liability, the defendant should be held to clear and positive averments, and should leave no room for doubt that he meant to charge distinctly that," etc.)

Standard Oil Co. vs. Scofield, 16 *Abb. N. C.*, 372. (Holding that a contract sued on will not, upon demurrer, be deemed void as in unlawful restraint of trade, and therefore contrary to public policy, if capable of a construction consistent with a lawful intent; although, upon a trial where all the facts are disclosed, it might appear that the arrangement was illegal, and to effect a combination inimical to the interests of the public.)

INABILITY.

§ 272. *Mere conclusion.*—A mere general allegation of inability, without anything to indicate the kind or nature thereof, is insufficient.

¹ *Chitt. on Pl.*, 16 *Am. ed.*, 335, citing 2 *Saund.*, 129, 132, to the effect that a declaration stating that arbitrators *could not* make their award, without showing the special cause which prevented them, was insufficient.
s. p., *Templeton vs. Sharp*, 10 *Ky. L. Rep.*, 499; s. c., 9 *South West. Rep.*, 507. (Allegation that owing to sickness defendant was in no condition to execute a legal note, bad.)

INDEBTEDNESS.

§ 273. "*Indebted*," or "*due*," as a conclusion.—An allegation that a person is or was "indebted," even though adding, "for moneys received," etc., or "for services," etc., describing the ground of indebtedness, is a mere conclusion, and insufficient on demurrer,¹ unless details of time, place, request, etc., are given sufficient to amount to a substantial allegation of facts showing liability.²

It may be otherwise where the indebtedness is merely collaterally relevant, and not directly involved, as where the existence of other creditors than plaintiff is alleged.³

An allegation that a sum is due, if by the context it appears to mean merely that a person is indebted, is a mere conclusion,⁴ and bad on demurrer except where sanctioned by statute;⁵ but where facts constituting indebtedness are substantially alleged, "due" may be understood to mean payable, and is an allegation of fact sufficient to show maturity of the debt.⁶

¹ *Roberts vs. Treadwell*, 50 *Cal.*, 520; s. p., *O'Connor vs. Dingley*, 26 *id.*, 21.

Millard vs. Baldwin, 69 *Mass.*, 484; *Hollis vs. Richardson*, 79 *id.*, 392; *Codding vs. Inhabitants of Mansfield*, 73 *id.*, 272.

Holgate vs. Broome, 8 *Minn.*, 243.

Gray vs. Kendall, 10 *Abb. Pr. (N. Y.)*, 66; s. c., 5 *Bosw.*, 666; *Lienan vs. Lincoln*, 2 *Duer (N. Y.)*, 670; *Merritt vs. Millard*, 5 *Bosw. (N. Y.)*, 645; *Bailey vs. Richmond*, 49 *N. Y. Super. Ct. (J. & S.)*, 519. [*Contra*, *Waters vs. Clark*, 22 *How. Pr. (N. Y.)*, 104.]

Crane vs. Lipscomb, 24 *So. Car.*, 430, 437.

Roeder vs. Brown, 1 *Wash. Terr.*, 112.

Otherwise if the indebtedness is alleged to be on an account. *Moffet vs. Sackett*, 18 *N. Y.*, 522.

An allegation that the party was "bound," made as establishing the liability sued on, but without stating facts showing that he was bound, is insufficient on demurrer. *Casey vs. Mann*, 5 *Abb. Pr.*, 91. (Action for negligence; against owner alleged to be "bound to repair.")

s. p., *Berley vs. Newton*, 10 *How. Pr.*, 490. (Error to submit it to jury to find whether party was "bound to know.")

Otherwise of an allegation that by his writing obligatory, specifying date, etc., he acknowledged himself bound, stating the terms of the obligation according to legal effect. *Gould's Pl.*, 57.

* *Allen vs. Patterson*, 7 *N. Y.*, 476.

* See *Neudecker vs. Kohlberg*, 81 *N. Y.*, 296.

* *Tooker vs. Arnoux*, 76 *N. Y.*, 397.

Bailey vs. Richmond, 49 *Super. Ct. (J. & S.)*, 519. (Allegation that defendant drew more than was due him as salary, or for any cause whatsoever.) [*Compare Roberts vs. Treadwell*, 50 *Cal.*, 520.]

[*Contra*, *Tessier vs. Reed*, 17 *Neb.*, 105; s. c., 22 *North West. Rep.*, 225.]

Rosenlower vs. Stein, *McADAM, J.* (not reported). (Allegation that between, etc., the parties had dealings, and that on, etc., there was due from defendant to plaintiff, "on account of said dealings," a specified sum, without otherwise stating for what, is not sufficient.)

Compare Tucker vs. Lovejoy, 73 *Wisc.*, 66; s. c., 40 *North West. Rep.*, 627. (Allegation of services rendered in 1873, and that compensation became due in 1884. *Held*, that the latter allegation was a mere conclusion, and that the claim was barred by the statute of limitations.)

* See §§ 198, etc.

* *Smith vs. Milton*, 133 *Mass.*, 369.

Allen vs. Patterson, 7 *N. Y.*, 476; s. p., *McKyring vs. Bull*, 16 *id.*, 297.

INSANITY. [See also INABILITY.]

§ 274. *General allegation*.—An allegation that a person "was of unsound mind, and for that cause legally incapable of making" the transaction which the pleader seeks to impeach, is, on demurrer, a sufficient allegation of the fact of mental incapacity.

Riggs vs. American Tract Soc., 84 *N. Y.*, 330, rev'g on an another point 7 *Abb. N. C.*, 433.

[For other cases see *Moore vs. Francis*, 20 *N. Y. State Rep.*, 641; s. c., 3 *N. Y. Supp.*, 162; *Valentine vs. Lunt*, 115 *N. Y.*, 496, rev'g 51 *Hun*, 544; *Re Kohler's Estate*, 79

Cal., 313; s. c., 21 *Pacif. Rep.*, 758; *Byrd vs. Nunn*, 25 *Weekly Rep. (Engl.)*, 749; *Ghasky's Estate*, 57 *Cal.*, 274.]

INSOLVENCY.

§ 275.—*Insolvency a fact, but not always enough.*—That a person or corporation was “insolvent,” is an allegation of fact.¹ Where it is necessary to show that it was useless to endeavor to collect from him, it must also be shown that he had no property out of which the demand, or part thereof, could be collected.²

¹ *Brown vs. Carbonate Bank (U. S. C. Ct. Colo.)*, 34 *Fed. Rep.*, 776. (Creditor's suit. *Held*, that evidence of insolvency need not be alleged.)

² *Smythe vs. Scott (Ind., 1886)*, 6 *North East. Rep.*, 145. (Action against indorser.)

s. p., *Thorp vs. Munro*, 47 *Hun (N. Y.)*, 246. (Here an allegation of the insolvency of the executor, and that he had expended the personal assets of the estate, was *held* admitted by demurrer; so that no accounting was necessary to charge a legacy on the real estate.)

INTENT. [See also FRAUD and MALICE.]

§ 276. *General allegation.*—An allegation of intent in an act past is an allegation of fact, admitted by demurrer.¹ Otherwise if details are stated which fail to bear out the allegation,² or which indicate a different intent.³

An allegation of intent as to a future act, if the mere ascription of a purpose which must be unknown, is not necessarily admitted by demurrer.⁴

¹ *Platt vs. Mead*, 9 *Fed. Rep.*, 91. (Intent to defraud creditors by a conveyance.)

Morrison vs. Lewis, 49 *N. Y. Super. Ct. (J. & S.)*, 178. (Replevin for goods bought by fraud. Allegation of false representations to mercantile agency with intent to obtain credit and induce merchants and others to sell. *Held*, sufficient allegation of intent to deceive plaintiff.)

* *Dillon vs. Bernard*, 21 *Wall. (U. S.)*, 430; *Taylor vs. Holmes*, 14 *Fed. Rep.*, 498, 509.

Wood vs. Amory, 105 *N. Y.*, 278. (Allegation that concealment by defendant in taking advantage of plaintiff's ignorance was done with intent to deceive and defraud, insufficient if the concealment alleged was not in violation of any duty of disclosure.)

* *Hall vs. Bartlett*, 9 *Barb. (N. Y.)*, 297. (Allegation that defendant, an attorney, bought a mortgage with intent to sue on it, followed by an allegation that he proceeded to foreclose by advertisement.)

* *Compare N. Y., Ontario, etc., Ry. Co. vs. Davenport*, 65 *How. Pr. (N. Y.)*, 484. (Complaint to remove cloud by assessment sale: allegation that comptroller did not intend to cancel the sale, but intended to give a deed, *held* sufficient. *Stone vs. Oconomowoc*, 71 *Wisc.*, 155; *s. c.*, 36 *North West. Rep.*, 829. (Allegation that city proposed to use city property "precisely as if the city were a private corporation," not admitted by demurrer.) And see § 37, PREDICTION; and § 265, INTENT TO DEFRAUD.

JUDGMENTS (AND OTHER DETERMINATIONS OF COURTS AND OFFICERS.) [See also FOREIGN LAW and DOCUMENTS.]

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|--------------------------------------------|-----------------------------------------------------------|
| § 277. General allegation enough. | § 282. Allegation if remaining in force. |
| 278. — as to Court of sister State. | 283. Jurisdiction of original cause of action. |
| 279. Special jurisdiction in sister State. | 284. <i>Statutory short allegation</i> :— |
| 280. United States Court practice,— | “duly given or made.” |
| in Court of first instance. | 285. — judgment, etc., of Court of U. S. or sister State. |
| 281. — on error or appeal. | |

§ 277. *General allegation enough*.—In pleading a judgment of a Court of general jurisdiction,¹ or of a Court of local jurisdiction created by a public statute of which the Court entertaining the present action is bound to take judicial notice,² it is not necessary to allege the facts giving jurisdiction, nor to set forth the proceedings.³

It is not essential to allege that the judgment was “duly” given or made, if the Court was one of general jurisdiction.⁴

¹ *Butcher vs. Bank*, 2 *Kan.* 70. (This was not necessary at common law. Citing 2 *Chitty's Pl.*, p. 414, *N. C.*;

Comyns' Dig. tit. Pleader, 2 W., 12, and E., 18. The Code has not changed this as to judgments of Courts of general jurisdiction.)

Masterson vs. Matthews, 60 *Ala.*, 260.

Burnes vs. Simpson, 9 *Kans.*, 658.

Hansford vs. Van Aiken, 79 *Ind.*, 157.

Holmes vs. Campbell, 12 *Minn.*, 221.

² *Spaulding vs. Baldwin*, 31 *Ind.*, 376.

³ *Biddle vs. Wilkins*, 1 *Pet. (U. S.)*, 686, 692.

⁴ *Rheinhardt vs. State*, 14 *Kans.*, 318.

§ 278. — *as to Court of sister State.*—It is the better opinion that the rule that facts showing jurisdiction need not be alleged in pleading a determination of a Court of general jurisdiction, applies to determinations of such Courts in sister States.

Brackman vs. Taussig, 7 *Colo.*, 561.

s. p., *Butcher vs. Bank*, 2 *Kans.*, 70.

Specklemeyer vs. Dailey, 23 *Nebr.*, 101; s. c., 8 *Am. St.*, 119; s. c., 36 *North West. Rep.*, 356. (And Court will take judicial notice that Circuit Court of sister State is a Court of general jurisdiction.)

Rugers vs. Odell, 39 *N. H.*, 452.

[And see *Mink vs. Shaffer*, 124 *Pa. St.*, 280; s. c., 23 *W. N. C.*, 348; 16 *Atl. Rep.*, 805; 46 *Phila. Leg. Int.*, 240; 19 *Pitts. L. J. N. S.*, 455. (Statement in assumpsit, under the Pennsylvania Act of 1887, based on an Iowa judgment.)]

Reid vs. Boyd, 13 *Tex.*, 241.

Jarvis vs. Robinson, 21 *Wisc.*, 523.

Tenney vs. Townsend, 9 *Blatchf. (C. Ct. U. S.)*, 274.

s. p., *Paine vs. Schnectady Ins. Co.*, 12 *R. I.*, 440, 5 *Reporter*, 221. (Holding that the Court might take judicial notice of the laws of the sister State.)

[See also cases under § 260, *Foreign Law*.]

[*Contra*, *Ashley vs. Laird*, 14 *Ind.*, 222; *Gebhard vs. Garnier*, 12 *Bush (Ky.)*, 321; *Harns vs. Kunkle*, 2 *Minn.*, 313; *Smith vs. Mulliken*, 2 *id.*, 319.

§ 279. *Special jurisdiction in sister State.*—In pleading the judgment of a court of special and limited jurisdiction in a sister State, the facts necessary to show jurisdiction of the subject-matter and of the person must

be alleged;¹ unless the statute of the State where the action is brought allows the short form of pleading judgments, etc., of courts of special jurisdiction,—in which case it is the better opinion that the foreign judgment may be pleaded in that manner.²

[But compare § 259, etc., *Foreign Law*.]

¹ *Spooner vs. Warner*, 2 *Bradw. (Ill.)*, 240.

Snyder vs. Snyder, 25 *Ind.*, 399; *Baker vs. Flint*, 63 *id.*, 137.

² *Lee vs. Terbell*, 33 *Fed. Rep.*, 850 (*U. S. C. Ct. S. D. N. Y.*).

Ault vs. Zehering, 38 *Ind.*, 429, 433.

Halstead vs. Black, 17 *Abb. Pr. (N. Y.)*, 227.

Archer vs. Romaine, 14 *Wisc.*, 375 (reversing for error in holding the contrary).

[*Contra*, *Kronberg vs. Elder*, 18 *Kans.*, 150.

[*Gebhard vs. Garner* 12 *Bush (Ky.)*, 321.

[*Harns vs. Kunkle*, 2 *Minn.*, 313.

[*Hollister vs. Hollister*, 10 *How. Pr. (N. Y.)*, 532; *De Nobeles vs. Lee*, 61 *id.*, 272; s. c., 47 *N. Y. Super. Ct.*, 372.

[*Cutting vs. Massa*, 15 *N. Y. State Rep.*, 316 (*dictum*).]

[In *Etz vs. Wheeler*, 23 *Mo. App.*, 449, action on a justice's judgment of another State, *held*, sufficient to state that jurisdiction has been duly conferred and the judgment "duly given and made." Citing *Wickersham vs. Johnson*, 51 *Mo.*, 313.]

§ 280. *United States Court practice,—in court of first instance.*—The rule that facts showing jurisdiction need not be alleged on pleading the judgment of a court of general jurisdiction, applies to such a judgment of a State Court pleaded in a Court of the United States.

Pennington vs. Gibson, 16 *How. (U. S.)*, 65.

§ 281. — *on error or appeal.*—The Supreme Court of the United States, in reviewing the decisions of a State Court, takes judicial notice of the law of a sister State involved in the case, if it is the practice of the Court under review to do so.

Otherwise it may treat the law of such sister State as a matter of fact to be alleged and proved as such.

Hanley vs. Donoghue, 116 *U. S.*, 1. (In applying this rule the Court held that an allegation that "by the law and practice of Pennsylvania the said judgment rendered in that State against Charles Donoghue and John Donoghue was valid and enforceable against Charles [who had been served with process in that State], and void against John," who had not been so served, must be considered, both in the Courts of Maryland [which Courts do not judicially notice laws of sister States] and in this court, on writ of error to one of those Courts, an allegation of fact, admitted by demurrer.)

§ 282. *Allegation of remaining in force.*—After pleading a judgment, it is unnecessary to add that it remains in full force, etc.

Masterson vs. Matthews, 60 *Ala.*, 260. (The reason is the law does not presume reversal of a judgment, nor its satisfaction, until after lapse of twenty years.)

In re Baird, 84 *Cal.*, 95. (Error to sustain demurrer for want of allegation that no appeal had been taken, or that the judgment had become final.)

s. p., *Campbell vs. Cross*, 39 *Ind.*, 155. (The Court say that a judgment is presumed to be in force until the contrary appears. "Presumptions of law need not be stated.")

§ 283. *Jurisdiction of original cause of action.*—Where the jurisdiction depends on the nature of the cause of action, and a judgment is pleaded as constituting the cause of action, the Court may look behind the judgment to the cause of action on which it was recovered, to determine whether it has jurisdiction of the action on the judgment.

State of Wisconsin vs. Pelican Ins. Co., 127 *U. S.*, 265; s. c., 32 *Law ed.*, 239. (Holding that the nature of a cause of action is not changed by recovering judgment upon it; and a Court to which a judgment is presented for enforcement may ascertain whether the claim is really one that the Court is authorized to enforce.)

s. p., *Betts vs. Bagley*, 12 *Pick. (Mass.)*, 572, 579. (SHAW, Ch. J.)

Clark vs. Rowling, 3 *N. Y.*, 216.

§ 284. *Statutory short allegation*,—"duly given or made."—The provision of statutes in many of the States to the effect that "in pleading a judgment, or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction,¹ but the judgment or determination may be stated to have been duly given or made;"—applies to the order of a board of public officers,² as well as to judicial decisions.

The use of the exact words "duly given or made" is not essential. It is enough if the allegation is substantially equivalent.³ But the word "duly" or its equivalent is essential.⁴

But if the pleader, without availing himself of that provision, undertakes to state the facts giving jurisdiction, etc., he must allege them fully.⁵

In the absence of such a statute, it is necessary to allege the commencement or pendency of the action in the court named, specifying the amount or character of the claim upon which it was brought, and that judgment was duly given thereon.⁶

[See the statutes noted at the end of the notes to this section.]

¹ *Bull vs. Horton*, 65 *Cal.*, 422. (Complaint by assignee in insolvency, alleging appointment duly made, need not allege notice to creditors nor that plaintiff was competent.)

Collins vs. Trotter, 81 *Mo.*, 275. (Appointment of guardian for deaf-mute. Allegation of notice to ward not necessary.)

² *Robinson vs. Jones*, 71 *Mo.*, 582. Order of a township board opening a road. [In some States the statute expressly mentions boards.]

³ *Lee vs. Terbell*, *C. C. S. D. N. Y.*, 33 *Fed. Rep.*, 850. (Allegation of the appointment of commissioners by a judgment "duly made by and entered in" a specified Court, sufficient.)

Roys vs. Lull, 9 *Wisc.*, 324. (Allegation that proceedings were had before a justice of the peace which were "terminated by a judgment being duly rendered," and

that the horse was seized by an execution issued thereupon, *held*, equivalent to an allegation of "duly made or given," allowed by R. S. of 1858, c. 125, § 23.)

State vs. Hufford, 23 *Iowa*, 579. (Allegation that bond sued on was duly filed and approved of by, etc., sufficient.)

Bailey vs. Merritt, 7 *Minn.*, 159. (Action by a mortgagor to recover an alleged surplus arising on a mortgage by advertisement. *Held*, by analogy to *Comp. Stat.*, 542, § 81, that allegations that the premises were sold at public auction to the highest bidder agreeably to the provisions of the statute in such cases made and provided and pursuant to the power of sale in said mortgage deed contained, were sufficient. Judgment therefore reversed.)

Kennagh vs. McColgan, 21 *N. Y. State Rep.*, 326; s. c., 4 *N. Y. Supp.*, 230. (Allegation that an order was "made in pursuance of the statute," sufficient.)

s. p., *Willis vs. Havemeyer*, 5 *Duer (N. Y.)*, 447.

Beans vs. Emanuelli, 36 *Cal.*, 117. (Action to quiet title. Allegation that "divers proceedings and decrees in the matter of the said estate were duly given and made in the Probate Court of said county, through and under which said proceedings and decrees this plaintiff became the purchaser," *held*, sufficient.)

Riddell vs. Harrell, 71 *Cal.*, 254. (Allegation that "the will has been duly probated" sufficient. Error to sustain demurrer. The statute makes "duly" enough.)

s. p., *Lazanes vs. Friedheim*, 51 *Ark.*, 371; s. c., 11 *South West. Rep.*, 518. (Allegation that judgment was had "in due course of procedure," admitted, if not denied.)

[In *Young vs. Wright*, 52 *Cal.*, 407, an allegation that "a judgment had been duly rendered" was held, doubtfully, not sufficient, because not a strict compliance. But a decision the other way would be more satisfactory.]

* *City of Los Angeles vs. Mellus*, 59 *Cal.*, 444. (Allegation that "an order was made" is not sufficient.) s. p., *Hunt vs. Dutcher*, 13 *How. Pr. (N. Y.)*, 538. (Judgment "was entered" not enough.)

[*Contra*, *Warfield vs. Gardner's Admr.*, 79 *Ky.*, 583. (Allegation that plaintiffs "were by an order of the Hardin County Court appointed administrators," *held*, sufficient, because the law presumes that it was duly made.)]

* *Keys vs. Grannis*, 3 *Nev.*, 548. (Conversion: defendant's answer alleged "that under and by virtue of a certain writ of attachment issued on the 7th day of Nov., 1866, by the justice of peace," etc., directed to him the said

defendant, then constable, he had attached the property. *Held*, insufficient to admit evidence; for the statute should be strictly construed.)

Judah vs. Fredericks, 57 *Cal.*, 389. (Allegation in a complaint that plaintiff "is the duly qualified and acting executrix," etc., is not sufficient, under the statute. Error to overrule demurrer.)

Hopper vs. Lucas, 86 *Ind.*, 43. (Holding that the pleader must either allege all the necessary facts, or that the judgment was duly given or made. Judgment therefore reversed.)

* *Page vs. Smith*, 13 *Oreg.*, 410.

Beach vs. King, 17 *Wend. (N. Y.)*, 197.

Such statutes exist in the following States. In all except *Arkansas*, *Iowa*, *Kansas*, *Kentucky*, *Minnesota*, and *Mississippi* the statute provides that if the allegation be controverted, the party pleading must establish at the trial the facts conferring jurisdiction.

Arkansas—*Mansfield's Digest*, § 5067. (A provision is added that if the allegation is made in a complaint and not controverted by answer, or in a counterclaim or set-off and not controverted by reply, it need not be proved on the trial.)

Arizona—*Civ. Pro. C.*, 2, § 13. *Rev. Stat.* (1887), 661.

California—*Code Civ. Pro.* *Deering's Anno. Codes and Stats.*, § 456. (The words are "Court, officer, or board," without adding "of special jurisdiction.")

Colorado—*Civ. Code. Sess. L.* (1887), § 65.

Idaho—*Rev. Stat.* (1887), § 4211. (Same as California, above.)

Indiana—*Civ. Pro. Rev. Stat.* (1888), § 369. (119.)

Iowa—*Code Civ. Pro. Rev. Code* (1888), § 2714.

Kansas—*Civ. Pro.*, § 121. *Gen. Stat.* (1889), ¶ 4204. (No provision as to burden of proof; but a provision adding that "the jurisdiction of any such Court or officer shall be presumed until the contrary appears.")

Kentucky—*Ky. Codes (Carroll, 1888)*, § 122 [148]. (The words are, "a Court or officer," without adding "of special jurisdiction.")

Minnesota—*Stat.* (1891), § 4789. (The words are, "of a Court or officer of special or general jurisdiction." And it is added: "In cases of special jurisdiction, if such allegation is controverted, the party pleading is bound to establish on the trial the facts showing such performance.")

Mississippi—*Rev. Code* (1880), § 1575. (After the provision in the usual form, that the judgment, etc., may be

stated "to have been duly given or made," it is simply added, "but the facts conferring jurisdiction shall be shown at the trial.")

Missouri—*Code Civ. Pro. Rev. Stats.* (1889), § 2079.

Montana—*Code Civ. Pro. Comp. Stat.* (1887), § 103.

Nebraska—*Comp. Stat.* (1887). *Code Civ. Pro.*, § 127.

Nevada—*Civ. Pro.*, § 59. *Gen. Stat.* (1885), § 3081.

New York—*Code Civ. Pro.*, § 532.

North Carolina—*Code Civ. Pro.*, c. 10, § 121. *Code* (1883).

North Dakota—*Civ. Pro. Comp. L.* (1887), § 4926.

Ohio—*Rev. Stat.* (1890), § 5090.

Oregon—*Hill's Anno. Laws* (1887), § 86.

South Carolina—*Code Civ. Pro.*, § 182. *Gen. Stat.* (1882).

South Dakota—*Civ. Pro. Comp. L.* (1887).

Utah—*Comp. Laws* (1888), § 3242. (The words "or board" are inserted after "Court.")

Wisconsin—*Sanborn & Berryman Anno. Stat.*, § 2673.

Wyoming—*Rev. Stat.* (1887), § 2477.

§ 285. — *judgment, etc., of Court of United States or of sister State.*—The short form allowed by the Codes of alleging judgments and determinations of Courts and officers of special and limited jurisdiction to be alleged as "duly given or made," is applicable to alleging a judgment or other determination of a Court or officer of the United States, when pleaded in a State Court.¹

It is the better opinion that it is also applicable to judgments and other determinations of Courts or officers of sister States.²

[As to application in pleading in a Court of the United States, compare §§ 27–31, 279.]

¹ *Laidley vs. Cummings*, 83 *Ky.*, 606. (Judgment reversed for error in holding contrary.)

Cutting vs. Massa, 15 *N. Y. State Rep.*, 316; s. c. as *Massa vs. Cutting*, 28 *Weekly Dig.*, 380. (Holding that the rule applies to judgment, etc., of United States Bankruptcy Court.)

² *Kronberg vs. Elder*, 18 *Kans.*, 150, and cas. cit.

See conflicting cases under § 279, note 2.

Gebhard vs. Garnier, 12 *Bush (Ky.)*, 321.

Cutting vs. Massa (above cited). (*Dictum.*)

The same mode of pleading might be sustained independently of the statute, under the doctrine that foreign law may be pleaded according to legal effect.

LACHES. [And see DELAY.]

§ 286. *Ground of Demurrer.*—Laches appearing on the face of plaintiff's pleading is available, in Equity, on a demurrer for want of equity;¹ and under the New Procedure, on a demurrer for not stating facts sufficient to constitute a cause of action.²

¹ Maxwell *vs.* Kennedy, 8 *How.* (*U. S.*), 221; Lansdale *vs.* Smith, 106 *U. S.*, 392.

Furlong *vs.* Riley, 103 *Ill.*, 628, 630. (Especially where the bill attempts to state an excuse and the excuse is insufficient.)

Noble *vs.* Turner, 69 *Md.*, 519; s. c., 18 *Md. L. J.*, 808, 16 *Atl. Rep.*, 124.

² Bell *vs.* Hudson, 73 *Cal.*, 285; s. c., 24 *Reporter*, 710.

Whether ignorance or impediments may be presumed on demurrer, compare, *affirmative*, Jones *vs.* Slauson, 33 *Fed. Rep.*, 632; *negative*, Bell *vs.* Hudson, above cited.

LEAVE TO SUE. [See also AUDIT.]

§ 287. When must be alleged.

§ 288. Form of allegation.

§ 287. *When must be alleged.*—A complaint not alleging leave to sue is demurrable, if leave is required because a statute forbids the action to be brought without leave;¹ or because the power to sue does not exist without leave, as in the case of a receiver not authorized by statute to sue without leave;² or because the cause of action is in another, and leave is necessary to enable plaintiff to enforce it, as in the case of a bond to the People, sued on in the name of an individual.³

If leave is required merely because of the settled practice of the Court, as in the case of an injunction bond in chancery,⁴ or in case of actions *against* a receiver,⁵ the remedy is by motion.

¹ Scofield *vs.* Doscher, 72 *N. Y.*, 491. (Deficiency judgment in foreclosure.)

Hauselt *vs.* Fine, 18 *Abb. N. C.* (*N. Y.*), 142. (The same, against heir.)

Followed in *U. S. Life Ins. Co. vs. Gage*, 3 *N. Y. Supp.*, 398; s. c., 17 *N. Y. State Rep.*, 762.

^a *Abb. N. Pr. & F.*, 459, n. 4.

s. p., *Freeman vs. Dutcher*, 15 *Abb. N. C.*, 431.

Cook County vs. Bushnell, 15 *Oregon*, 169; s. c., 13 *Pacif. Rep.*, 886. (Statute forbidding action on official undertaking or bond, by an individual plaintiff, unless by leave.)

Arnold vs. Gaylord, 16 *R. I.*, 573; s. c., 18 *Atl. Rep.*, 177. (Holding that under a statute providing that no action [for injuries criminally inflicted and causing death] lies until after a complaint to a proper magistrate for the crime,—the omission to make complaint need not be set up by plea, but plaintiff must allege complaint made.)

Farish vs. Austin, 25 *Hun (N. Y.)*, 430. (The objection that a judgment by default was taken in an action upon a judgment, without alleging in the complaint leave to sue obtained, as required by *N. Y. Code Pro.*, § 71, is not a mere irregularity which is waived by the defendant's failure to object; but the judgment so obtained is invalid, and will be vacated on motion.)

[For the similar statute now in force see *Code Civ. Pro.*, § 913.]

s. p., on demurrer, *Graham vs. Scripture*, 26 *How. Pr. (N. Y.)*, 501. [*To the contrary* were *Finch vs. Carpenter*, 5 *Abb. Pr.*, 225; *Dean vs. Eldridge*, 29 *How. Pr.*, 218; *Prince vs. Cujas*, 7 *Robt.*, 76.]

[*Compare People vs. Blankman*, 17 *Wend.*, 252. (Recognition, sued under 2 *R. S.*, 486, § 31, directing that an order of Court be entered, but not forbidding action without. Allegation not necessary.)]

^a *Manlove vs. Burger*, 38 *Ind.*, 211; *Grover vs. Kent*, 70 *id.*, 428.

Cooke vs. Bowles, 42 *Barb. (N. Y.)*, 87.

See the distinction between a statutory and a common-law receiver explained, with the cases, in note in 19 *Abb. N. C.*, 359.

A statutory receiver, under a statute authorizing him to sue irrespective of leave of Court, while he may apply for leave to protect himself from liability for costs (5 *Abb. N. C.*, 346), and in an equity action allege it for that purpose, need not allege it in order to make out a cause of action (4 *Abb. N. Y. Dig.*, 423).

[In *Walsh vs. Byrnes*, 39 *Minn.*, 527, lack of allegation of authority to sue seems to have been regarded like lack of allegation of appointment, as rendering the complaint demurrable, not for insufficiency, but only for want of legal capacity to sue.]

^a *Waterman vs. Dockray*, 78 *Me.*, 139.

- Raynor *vs.* Clark, 7 *Barb.*, 581. (Nonsuit at the trial.)
 [Otherwise where the suit is in the name of the obligee, although for the benefit of an individual. See Mayor, etc., of N. Y. *vs.* Brett, 2 *Hilt.* (N. Y.), 560.]
 [For other cases see Cuddleback *vs.* Kent, 5 *Paige* (N. Y.), 92; Harris *vs.* Hardy, 3 *Hill* (N. Y.), 393.]
 * Higgins *vs.* Allen, 6 *How. Pr.* (N. Y.), 30.
 * Lenthold *vs.* Young, 32 *Minn.*, 122; Town of Roxbury *vs.* Central Vt. R. Co., 60 *Vt.*, 121; s. c., 14 *Atl. Rep.*, 92.
 [Contra, Keen *vs.* Breckenridge, 96 *Ind.*, 69.]
 [Compare Fisher *vs.* Andrews, 37 *Hun* (N. Y.), 176. (Holding that omission to allege receiver's refusal to sue, and omission to allege leave to sue receiver by joining him with the one he ought to have sued, is fatal at the trial.)]

According to some authorities, where leave is required to sue a receiver or other officer of a Court of another jurisdiction, the want of leave is a jurisdictional objection. Barton *vs.* Barbour, 104 *U. S.*, 126; disapproved in Lyman *vs.* Central Vt. R. Co., 59 *Vt.*, 167; s. c., 10 *Atl. Rep.*, 346.

- [The decision in Barton *vs.* Barbour is an extreme one, but perhaps sound in view of the rule that a judicially appointed trustee, such as an executor, administrator, receiver, etc., having his sole authority from a foreign jurisdiction, is not subject to suit here, except on a personal liability, or in respect to assets here.]
 [Contra, Smith *vs.* Bauer (*Col.*, 1886), 12 *Pacif. Rep.*, 397. (Action in State Court against U. S. marshal. The allegation that the Federal Court had consented to the suit was defective. *Held*, that the point was not jurisdictional; and after answer, trial, and verdict, the objection was too late.)]

§ 288. *Form of allegation.*—An allegation showing in substance that leave has been obtained by the plaintiff, from the proper court, to bring the action in question, is enough if sufficient to inform the defendant as to the essential facts, although it be brief and informal.

- Dunham *vs.* Byrnes, 36 *Minn.*, 106; s. c., 30 *North West. Rep.*, 402.
 s. p., Swords *vs.* Northern Light Oil Co., 17 *Abb. N. C.*, 115.
 Bank of Buffalo *vs.* Broughton, 21 *Wend.* (N. Y.), 57.
 (*Held*, that in an action upon a recognizance, which by

statute can only be brought by an aggrieved party who shall be authorized by court to prosecute, a declaration alleging that the bond was ordered to be delivered up to be prosecuted, without naming the plaintiffs or authorizing them to prosecute, is not sufficient on demurrer.)

Smith vs. Bauer (Col., 1886), 12 *Pacif. Rep.*, 327. (*Held*, that an allegation not showing that the consent covered the present suit was defective, and would have been obnoxious to motion to compel amendment; but was sufficient after verdict.)

LIABILITY. [See also INDEBTEDNESS.]

§ 289. *A conclusion of law.*—An allegation that a party “became liable,” or was “therefore liable,” if stated as the ground for the recovery sought, is a mere conclusion of law; and cannot avail by itself; nor even in connection with specific allegations of the facts claimed to raise the liability unless such specific facts are in themselves sufficient to show the liability.

Jones vs. Dow, 137 *Mass.*, 119.

Compare to contrary, *Clay vs. Edgerton*, 19 *Ohio St.*, 549.

LIEN.

§ 290. *A conclusion of law.*—An allegation that a lien was created, or that property was subject to a mortgage, is a mere conclusion.¹

But an allegation that a judgment pleaded as having been recovered was a lien, sufficiently imports that it was docketed so as to become a lien.²

¹ *Price vs. Doyle*, 34 *Minn.*, 400; s.c., 26 *North West. Rep.*, 14. s. p., *Griggs vs. City of St. Paul*, 9 *Minn.*, 246. (Allegation that certificates were worthless and no lien.)

² *Cady vs. Allen*, 22 *Barb. (N. Y.)*, 388.

LIMITATIONS. [See also DELAY and LACHES; and, for other statutory bars, LEAVE TO SUE, §§ 287, 288; Statute of Frauds under CONTRACTS, § 167; and STATUTES.]

§ 291. *Limitation by statute, when available on demurrer.*—In the absence of any statute providing otherwise, the objection that the complaint shows on its face that the cause of action is barred is available on demurrer for not stating facts sufficient to constitute a cause of action.¹

And the objection is fatal, unless the pleading also alleges facts bringing the case within an exception.²

¹ *Mercantile Nat. Bank vs. Carpenter*, 101 *U. S.*, 567. (Bill in equity.)

Chemung Canal Bank vs. Lowery, 93 *U. S.*, 72, 76, and *cas. cit.* (Holding the rule settled in Wisconsin, notwithstanding the statute that it can only be taken by answer; for a demurrer is there regarded as a sufficient answer for the purpose.)

Hett vs. Collins, 103 *Ill.*, 74 (citing *Story Eq. Pl.*, § 484; *Foster vs. Hodson*, 19 *Ves.*, 180; *Hoare vs. Peck*, 6 *Sim.*, 51).

Biays vs. Roberts, 68 *Md.*, 510; *s.c.*, 12 *Cent. Rep.*, 113; 13 *Atl. Rep.*, 366. (Bill in equity; demurrer for want of equity.)

Merriam vs. Miller, 22 *Neb.*, 218; *s. c.*, 34 *North West.*, 625. (Action on bond.)

In some States the demurrer is required to be special.

² *Bloodgood vs. Bruen*, 8 *N. Y.*, 362.

Van Patten vs. Bedow, 75 *Iowa*, 589; *s. c.*, 39 *North West.*, 907.

Whether a general provision of the statute of limitations requiring that the objection that the action was not commenced in time be taken by answer, applies to special limitations not contained in the general statute of limitations, is a question of construction depending on the form of the particular statute. See Note in 8 *Abb. N. C. (N. Y.)*, 196; *Bihin vs. Bihin*, 17 *Abb. Pr.*, 19; *Kaiser vs. Kaiser*, 16 *Hun (N. Y.)*, 602.

MAINTAINING.

§ 292. *Meaning of allegation.*—Strictly construed, an allegation showing duty to “maintain,” or failure to maintain, refers only to the supporting or continuing what before existed.

Louisville, etc., Ry. Co. vs. Godman (Ind., 1886), 4 *North*

East. Rep., 163. (Complaint against carriers for loss of cattle by means of "failure to keep in repair and maintain means and ways to put the cattle on the cars," held bad on demurrer; for "the extent to which the ways and means for loading the cattle were out of repair is not stated in the complaint, nor is there any averment that they were so out of repair that the cattle might not have been loaded." "In the case of *Moon vs. Durden*, 2 *Exch.*, 21, it was said: 'The verb to *maintain*, in pleading, has a distinct technical signification. It signifies to support what has already been brought into existence.'")

MARRIED WOMEN.

§ 293. *Sued as sole*.—Under a statute rendering married women "liable to be sued in the same manner as if sole," a declaration or complaint is sufficient which would be sufficient if she were not under coverture.

Van Buren vs. Swan, 4 *Allen (Mass.)*, 380.
Abb. Tr. Ev., 180, 181.

MISNOMER. [See also NAME.]

§ 294. *Demurrer for misnomer*.—The objection that the plaintiff sues in a name which is not the correct one is not available on demurrer.

Hudson vs. Poindexter, 42 *Miss.*, 304. (Suit on note payable to plaintiff as probate judge and ex officio trustee of the county school fund and his successors in office. *Held*, that the objection that he sued for the use of the school fund trustees of Section 16, etc.,—not naming them,—instead of for the use of trustee of schools and school lands of township No. 21, etc., could not be raised by demurrer, but only by plea in abatement.)
Paine vs. Waterloo Gas Co., 69 *Iowa*, 211; s. c., 28 *North West. Rep.*, 560. ("Limited" omitted from associate name.)

MISTAKE. [See also MISNOMER and FRAUD.]

§ 295. General Allegation.

§ 296. Mutuality.

§ 295.—*General allegation*.—A general allegation that the instrument was made by mistake is not enough. The

true intent and the erroneous provision must both be stated.

Craft vs. Thompson, 51 *N. H.*, 536. (Allegation that award was obtained through inadvertence, misapprehension, mistake, or undue bias or partiality of the referee, without any specification of matters of fact,—bad on demurrer.)

Gains vs. Park, 3 *B. Monr. (Ky.)*, 223; s. c., 38 *Am. Dec.*, 185. (Mistake in account.)

§ 295a. *Mutuality*.—Where the pleader relies on a mistake in reducing to writing the contract sued on, as distinguished from a mutual mistake in the making of the contract, an allegation that the mistake was mutual is not necessary.

Pitcher vs. Hennessey, 48 *N. Y.*, 415.
s. p., *Born vs. Schrenkeisen*, 110 *id.*, 55.

NAME. [See also MISNOMER.]

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|----------------------------------------------|-----------------------------------|
| § 296. Contract, etc., in wrong name. | § 300. Repeating name of parties. |
| 297. Name unknown. | 301. Title and body of pleading. |
| 298. Initial. | 302. Singular and plural. |
| 299. Introductory description of plaintiffs. | |

§ 296. *Contract, etc., in wrong name*.—A party who has contracted in an assumed name, or who is sued on an obligation which names him wrongly, may sue or be sued in his true name, but it is essential to add an explanatory allegation.

N. Y. African Society vs. Varick, 13 *Johns. (N. Y.)*, 38.

Bloomfield Railroad Co. vs. Burress, 82 *Ind.*, 83.

Donnelly vs. Foote, 19 *Wend. (N. Y.)*, 148.

Loving vs. State, 9 *Tex. App.*, 471.

Ansley vs. Green, 82 *Ga.*, 184. (Declaration against wife by her own given name on contract which she signed by using her husband's given name with the prefix "Mrs.," not demurrable.)

§ 297. *Name unknown*.—A defendant whose name is unknown may, under modern statutes, be sued by a fictitious name by adding an allegation that such name or specified part of it is fictitious, and is used because the real name, or the full name, as the case may be, is unknown to the plaintiff; and the person served cannot sustain a demurrer on that ground.

Gannon vs. Myers, 11 *Civ. Pro. R. (N. Y.)*, 187; *Earle vs. Scott*, 50 *How. Pr. (N. Y.)*, 506.

§ 298. *Initial*.—The omission to indicate any Christian or given name for a party otherwise than by initial is not a ground of demurrer, for the Court cannot judicially know that the initial does not constitute the name.

Tweedy vs. Jarvis, 27 *Conn.*, 42.

Perkins vs. McDowell (*Wyom.*, 1890), 23 *Pacif. Rep.*, 71. s. p., *Sarony vs. Burrow-Giles Lithographic Co.*, 17 *Fed. Rep.*, 591.

Compare Fisher vs. Northrup (*Mich.*, 1890), 7 *L. A. R.*, 629. (Holding that where it was conceded that the letter was only an initial, and the attorney could not amend because he did not know the name, nor ask time to ascertain it, motion to dismiss must be granted. Judgment reversed for error in holding the contrary.)

Where defendant's answer set out the full names of all the parties, *held*, that the complaint was defective, but the defect was cured by the answer. *Sherrod vs. Shirley*, 57 *Ind.*, 13.

As to omission of first names of partners, see *Rogers vs. Verlander*, 30 *W. Va.*, 619; s. c., 5 *South East. Rep.*, 848.

§ 299. *Introductory description of plaintiffs*.—The fact that the action is brought not only on behalf of the individual plaintiffs named, but as well for the benefit of others similarly interested, sufficiently appears from an introduction in the complaint describing the plaintiffs as "suing in behalf of themselves and of all other" creditors,

etc., etc., without a direct allegation that they are suing for the benefit of the whole.

Cochran vs. American Opera Co., 20 *Abb. N. C. (N. Y.)*, 114.

Dennis vs. Kennedy, 19 *Barb. (N. Y.)*, 517. (Holding that a complaint by one or more of a numerous class may state that the plaintiffs sue for the benefit of those interested who may "come in and contribute to the expenses;" for, under the established practice, the words of the Code (§ 119)—"for the benefit of the whole"—mean no more.)

§ 300. *Repeating names of parties.*—When the parties have once been named in the title of the pleading it is unnecessary to repeat their name in the body of the pleading, but they may be referred to there in any manner that will sufficiently designate them,—as, for instance, by surname,¹ or by the words "the plaintiff," "the defendant," where they are so described in the title.²

¹ *Adams Exp. Co. vs. Harris*, 120 *Ind.*, 73; s. c., 6 *R. R. & Corp. L. J.*, 2; 21 *North East.*, 340.

King vs. Bell, 13 *Neb.*, 409.

Hildreth vs. Becker, 2 *Johns. Cas. (N. Y.)*, 339.

² 1 *Chitt. Pl.*, 16 *Am. ed.*, 266.

Lowry vs. Dutton, 28 *Ind.*, 473.

McLeran vs. Morgan, 27 *Ark.*, 148.

In an action against surviving partners as such, though naming the deceased, it is only the survivors who are to be deemed intended by the words "said defendants."

Schimmelpennick vs. Turner, 6 *Pet.*, 1; s. c., 8 *Law. ed.*, 297.

§ 301. *Title and body of pleading.*—If the allegations are appropriate to an action by or against a party in an official or representative character, and it sufficiently appears, by designating him as suing or sued in that capacity in the title of the cause, that he appears or is joined in that capacity, a demurrer does not lie for not repeating such designation in the body of the complaint.¹

Conversely, if it sufficiently appears by such designation in the body of the pleading, the complaint is not demurrable for not containing the same statement in the title.²

¹ *Stanley vs. Chappell*, 8 *Cow. (N. Y.)*, 235.

² *Plaut vs. Plaut (N. J., 1888)*, 12 *Cent. Rep.*, 239; 13 *Atl. Rep.*, 849.

The word "as" inserted between the name of the party and his official description is sufficient, but not conclusive. *Stilwell vs. Carpenter*, 2 *Abb. N. C. (N. Y.)*, 238.

§ 302. *Singular and plural*.—The use of the word "plaintiff" or "defendant" in the singular instead of in the plural will not sustain a demurrer under the New Procedure if it can be cured by justly regarding it as a clerical error.

Chamberlin vs. Kaylor, 2 *E. D. Smith, (N. Y.)*, 134.

At common law it might sustain a special demurrer. 1 *Chitt. Pl.*, 16 *Am. ed.*, 266.

NECESSITY.

§ 303. *Allegation of fact*.—An allegation that a thing was necessary, the purpose being shown, is an allegation of fact sufficient on demurrer,¹ unless particulars are stated which show the allegation to be unfounded.

¹ *Spear vs. Bicknell*, 5 *Mass.*, 125, 131.

Glover vs. Tuck, 1 *Hill (N. Y.)*, 66. (Allegation that plaintiff necessarily incurred expenses is equivalent to averring that he incurred necessary expenses.)

Roeder vs. Ormsby, 13 *Abb. Pr. (N. Y.)*, 334; s. c., 22 *How. Pr.*, 270. (Allegation that plaintiff was compelled to pay medical expenses equivalent to alleging that they were necessary.)

1 *Chitt. Pl.*, 16 *Am. ed.*, 259. (Allegation that goods supplied were "necessaries," sufficient without stating what they were.)

NEGLIGENCE. [See also NUISANCE and TORTS.]

§ 304. General allegation.

305. Form of allegation.

306. Agency.

§ 307. Indirect allegation.

308. Contributory negligence

§ 304. *General allegation*.—Negligence is a traversable fact; and a general allegation, without stating the particulars showing negligence, is enough as against a demurrer for insufficiency.¹

And a general allegation of negligence is equivalent to whatever degree of negligence is necessary to sustain the pleading.²

But a duty of care must be shown,³ and the connection of cause and effect between the negligence and the injury.⁴

¹ *Harper vs. Norfolk & W. R. R. Co.* (*U. S. Cir. Ct. W. D. Va.*), 36 *Fed. Rep.*, 102.

Mobile & M. R. Co. vs. Crenshaw, 65 *Ala.*, 566.

Hobson vs. New Mex. & Ar. R. Co. (*Ariz.*), 11 *Pacif. Rep.*, 551. (Allegation that the casualty was caused by the negligence of defendants and its servants, sufficient on general demurrer; but would not be on special demurrer.)

Fordyce vs. Merrill, 49 *Ark.*, 277; s. c., 5 *South West. Rep.*, 329.

Central R. R. Co. vs. Kitchens, 83 *Ga.*, 83 (citing *Harris vs. Central Railroad Co.*, 78 *Ga.*, 525); *Central R. R., etc., Co. vs. Denson*, 83 *Ga.*, 266.

Hammond vs. Schweitzer, 112 *Ind.*, 246; s. c., 11 *West. Rep.*, 661; 13 *North East. Rep.*, 869; *Ohio, etc., R. Co. vs. Walker*, 113 *Ind.*, 196; s. c., 12 *West. Rep.*, 731; 15 *North East. Rep.*, 234; *Anderson vs. East*, 117 *Ind.*, 126; s. c., 2 *L. R. A.*, 712; 19 *North East. Rep.*, 726; 28 *Centr. L. J.*, 362.

Scott vs. Hogan, 72 *Iowa*, 614; s. c., 34 *North West. Rep.*, 444.

Louisville & N. R. Co. vs. Wolfe, 80 *Ky.*, 84; *Louisville & N. R. Co. vs. Mitchell*, 87 *Ky.*, 327; s. c., 8 *South West. Rep.*, 706.

Rolseth vs. Smith, 38 *Minn.*, 14; s. c., 35 *North West. Rep.*, 565.

MacFadden vs. Missouri Pacif. R. Co., 92 *Mo.*, 343.

Davis vs. Guarnieri, 45 *Ohio St.*, 470; s. c., 13 *West. Rep.*, 438; 15 *North East. Rep.*, 350.

Washburn *vs.* Chicago & N. W. R. Co., 68 *Wisc.*, 474; s. c., 32 *North West. Rep.*, 234.

[*But compare* Jones *vs.* Old Dominion Cotton Mills, 82 *Va.*, 140; s. c., 10 *Va. L. J.*, 468; Hazard Powder Co. *vs.* Volger (*Wyo.*), 18 *Pacif. Rep.*, 636.]

[See cases on Allegation and Proof of Negligence, collected in 22 *Abb. N. C.*, 236.]

*Nolton *vs.* Western R. R. Co., 15 *N. Y.*, 444.

Approved in Rockford, R. I. & St. L. R. R. Co. *vs.* Phillips, 66 *Ill.*, 551.

As to the distinction between the necessary allegations of negligence and of nuisance, see § 317, and Note in 25 *Abb. N. C.*, 195.] *

*Jennings *vs.* Fitchburg R. Co., 146 *Mass.*, 621; s. c., 6 *N. Eng.*, 269, 16 *North East.*, 568.

Hover *vs.* Barkhoof, 44 *N. Y.*, 113.

s. p., Middleton *vs.* Philadelphia Traction Co., 21 *W. N. C. (Pa.)*, 528.

[See § 256, DUTY.]

*Pike *vs.* Chicago & A. R. Co. (*U. S. C. Ct. E. D. Mo.*, 1889), 39 *Fed. Rep.*, 754.

Pittsburgh, C. & St. L. Ry. Co. *vs.* Conn., 104 *Ind.*, 64; s. c., 3 *North East. Rep.*, 636.

§ 305. *Form of allegation.*—No particular form of words is necessary to make out an allegation of negligence. It is enough on demurrer that facts are stated which show negligence.

City Council of Montgomery *vs.* Gilmer, 33 *Ala.*, 116.

Weis *vs.* City of Madison, 75 *Ind.*, 241, 246.

Sabine, etc., R. Co., *vs.* Hadnot, 67 *Tex.*, 503, 505; s. c., 30 *Am. & Eng. R. Cas.*, 197; 4 *South West. Rep.*, 138.

Mootry *vs.* Town of Danbury, 45 *Conn.*, 550, 555. (Omission to say that the insufficient construction of a bridge was negligent not enough to defeat the action by implying that it must have been malicious or wilful.)

§ 306. *Agency.*—An allegation of negligence on the part of a master or corporation is not insufficient merely because the negligence must have been that of an officer or servant, if it be imputable by law to the principal.¹

But an allegation of negligence on the part of the officer or servant is equally sufficient.²

¹ 1 *Chitt. Pl.*, 16 *Am. ed.*, 407.

Bronson vs. Town of Washington, 57 *Conn.*, 346. (Allegation that the town neglected to act, sufficient, on a statute making it the duty of the selectmen to act. But compare § 137, end of note 1, on p. 130.)

Piercy vs. Averill, 37 *Hun (N. Y.)*, 361; *Oakley vs. Town of Mamaroneck*, 39 *id.*, 448.

* *Farman vs. Town of Ellington*, 46 *Hun (N. Y.)*, 41.

§ 307. *Indirect allegation*.—An allegation that “by reason of the negligence” of the party in doing a specified act the injury was caused, is sufficient on general demurrer.

Weinstein vs. Jefferson Nat. Bank, 69 *Tex.*, 38; s. c., 5 *Am. St. Rep.*, 23; 6 *South West. Rep.*, 171. (Depositor’s action against bank. Answer that, by reason of plaintiff’s “negligence and failure” to examine and report any errors or forgeries therein, it was “debarred the right and opportunity of protecting itself.”)

Compare *Brown vs. Harmon*, 21 *Barb. (N. Y.)*, 508. (Similar allegations in statutory action, bad; but cured by verdict.)

§ 308. *Contributory negligence*.—It is the better opinion that a complaint alleging defendant’s negligence as the cause of the injury sufficiently implies that there was no contributory negligence on plaintiff’s part.¹

In those jurisdictions where an affirmative allegation that the plaintiff was not negligent is required, a general allegation that he was without fault is sufficient, unless details also stated show that he was guilty of contributory negligence.²

An allegation that the person injured was without fault is not equivalent to an allegation of want of knowledge.³

¹ *O’Connor vs. Missouri Pacific R. Co.*, 94 *Mo.*, 150; s. c., 13 *West. Rep.*, 587; 7 *South West. Rep.*, 106.

Lee vs. Troy Citizen’s Gas-light Co., 98 *N. Y.*, 115.

[*Contra*, 1 *Shearm. & R. on Negl.*, 192, § 113, approving the Indiana rule.]

¹ Ohio, etc., *R. Co. vs. Walker*, 113 *Ind.*, 196; s. c., 15 *North East. Rep.*, 234.

² *Allen vs. Augusta Factory*, 82 *Ga.*, 79.

s. p., *Brazil Block Coal Co. vs. Gaffney*, 119 *Ind.*, 455; s. c., 4 *L. R. A.*, 850; s. c., 40 *Alb. L. J.*, 58; 21 *North East. Rep.*, 1102.

NON-PAYMENT. [See also §§ 191–196, CONTRACT: *Breach.*]

§ 309. *By whom.*—When non-payment needs to be pleaded,¹ an allegation that the person shown to have been indebted has not paid is enough, even though he be deceased. If a stranger or personal representative has paid, this is for the other side to show.²

¹ As to the cases where it must be alleged, see §§ 191, 196, BREACH; and § 329, PAYMENT.

² *Gray vs. Supreme Lodge*, 118 *Ind.*, 293; s. c., 20 *North East. Rep.*, 833; 18 *Ins. L. J.*, 431. (Assessment in insurance case.)

Wise vs. Hogan, 77 *Cal.*, 184; s. c., 19 *Pacif. Rep.*, 278. (Non-payment of note of intestate; so even under California rule that plaintiff must allege non-payment.)

NOTICE. [See also DEMAND.]

§ 310. Burden to allege.

311. General allegation.

312. Statutory requirement.

313. Posting notices.

§ 314. Reasonable notice.

315. Denial of notice.

316. Knowledge.—Facts implying notice.

§ 310. *Burden to allege.*—Where the right or liability depended on an event lying within the peculiar knowledge of the party pleading, he must allege notice to the opposite party.

1 *Chitt. Pl.*, 16 *Am. ed.*, 337.

Wangler vs. Swift, 90 *N. Y.*, 38 (where various forms of the rule are stated); *Clough vs. Hoffman*, 5 *Wend. (N. Y.)*, 499.

Alabama, etc., R. Co. vs. Rowley, 9 *Fla.*, 508.

Harrison vs. Vreeland, 38 *N. J. L.*, 366.

[For other cases see *Hobart vs. Hilliard*, 11 *Pick. (Mass.)*, 143; *Cole vs. Jessup*, 2 *Barb. (N. Y.)*, 309.]

§ 311. *General allegation*.—Where formal notice is required, a mere allegation of “due notice” has been held insufficient.

Kechler vs. Stumm, 36 *N. Y. Super. Ct. (J. & S.)*, 337.
(Notice to appear under mechanic’s lien.) [For the better opinion see § 255, DULY.]

§ 312. *Statutory requirement*.—Under a statute forbidding an action until after notice and the lapse of time, omission to allege the giving of such notice (or an excuse for omitting it) and the lapse of the required time, is fatal on demurrer.¹

Under a statute forbidding an action to be brought until after notice in writing, omission to allege that notice given was in writing is fatal.²

¹ *Porter vs. Kingsbury*, 5 *Hun*, 597; aff’d in 71 *N. Y.*, 588.
(Action on undertaking.) [*Compare* § 184, *Statutory Allegation of Performance of Condition*.]

² *Commonwealth vs. Wilson*, 7 *W. N. C. (Pa.)*, 62.
[*Compare* §§ 146, 147, AUDIT; §§ 287, 288, LEAVE TO SUE; and § 167, statute of frauds as to CONTRACTS; and STATUTES.]

§ 313. *Posting notices*.—A general allegation that notices were posted as the law requires, is sufficient without designating the places, if the fact is one collaterally involved.

Sewall vs. Valentine, 6 *Pick. (Mass.)*, 276; *Burditt vs. Grew*, 8 *id.*, 108.
[See also § 140, APPEARANCE; and § 255, DULY; and § 335, REGULARITY.]

§ 314. *Reasonable notice*.—Where reasonable notice was required, a general allegation of reasonable notice, with no particulars, is not enough.

McCormick vs. Tate, 20 *Ill.*, 334. (General allegation

of reasonable notice to remove a fence insufficient on demurrer.)

Cruger vs. Hudson River R. R. Co., 12 *N. Y.*, 190.

§ 315. *Denial of notice*.—An allegation that an act was done without notice, or that no notice was given, is good.¹

An allegation that no legal or sufficient notice was given is a mere conclusion of law, and insufficient.²

¹ *Wells County vs. Gruver*, 115 *Ind.*, 224; s. c., 17 *North East. Rep.*, 290; 15 *West Rep.*, 130.

² *Kedzie vs. West Chicago Park Comm'rs*, 114 *Ill.*, 280; s. c., 2 *North East. Rep.*, 183. (Per CURIAM: "If no notice was given, that is a fact and should have been stated. But if a notice was given the legality of which is denied, a question of law is raised, and the notice given should be specifically set out in order that it may be seen whether it conforms to the requirements of the law.")

Harris vs. Ross, 112 *Ind.*, 314; s. c., 13 *North East. Rep.*, 873.

§ 316. *Knowledge*.—*Facts implying notice*.—Where knowledge is sufficient, adding to the statement of the facts the general allegation, "which defendant well knew," is sufficient.¹

And an allegation of facts which necessarily imply knowledge is equivalent.²

Otherwise where notice is necessary.³

¹ *Fairchild vs. Bentley*, 30 *Barb. (N. Y.)*, 147; *McGinity vs. Mayor, etc., of N. Y.*, 5 *Duer (N. Y.)*, 674.

² *City of New York vs. Dimick*, 2 *N. Y. Supp.*, 46.
s. p., *Cleveland vs. King*, 132 *U. S.*, 295.
Lambert vs. Haskell (Cal.), 22 *Pacif. Rep.*, 327, citing *Pierce vs. Whiting*, 63 *Cal.*, 540.

³ *Betton vs. Williams*, 4 *Fla.*, 11.
s. p., 1 *Chitt. Pl.*, 16 *Am. ed.*, 403, (but conceding it cured by verdict.)

NUISANCE. [See also NEGLIGENCE, and TORTS.]

§ 317. *General rule.*—In a private action for nuisance, facts showing plaintiff's right must be alleged;¹ and, as against the mere continuer of a nuisance created by others, notice or demand must be alleged.²

If the facts stated show a wrong, it is not necessary to use the word "nuisance,"³ nor to allege wrongful intent,⁴ nor negligence.⁵

¹ 2 *Chitt. Pl.*, 16 *Am. ed.*, 513.

Barry vs. McAvoy, 10 *Phila.*, 99.

² *Groff vs. Ankenbrandt*, 124 *Ill.*, 51. (Presumption against the pleader that defendant was a mere continuer if contrary be not indicated.)

³ *Laffin & Rand Powder Co. vs. Tearney (Ill., 1890)*, 7 *L. R. A.*, 262.

⁴ 1 *Chitt. Pl.*, 16 *Am. ed.*, 404.

Wilkinson vs. Applegate, 64 *Ind.*, 98.

⁵ See note in 25 *Abb. N. C. (N. Y.)*, 195, on the Distinction between Negligence and Nuisance.

OFFER. [See also CONTRACTS, and DEMAND.]

§ 318. To whom and where.

§ 319. Offer to do equity.

§ 318. *To whom and where.*—Where evidence that an offer has been made is necessary to put the adverse party in the wrong, a general allegation that an offer was made is insufficient. The allegation must show to whom;¹ and if under the contract time² or place³ is material, the allegation must be specific in that respect.

[But see §§ 182, 188, 198, allegation of performance of condition in CONTRACT.]

¹ *Mills vs. Gould*, 1 *Abb. N. C. (N. Y.)*, 93.

² *Vance vs. Blair*, 18 *Ohio*, 532; s. c., 51 *Am. Dec.*, 467.

³ *Mills vs. Gould* (above cited).

Clark vs. Dales, 20 *Barb. (N. Y.)*, 42.

s. p., *Ferner vs. Williams*, 14 *Abb. Pr. (N. Y.)*, 215; s. c., less fully, 37 *Barb. (N. Y.)*, 9. (But holding that the word "duly" was enough as to place. Compare § 255, "DULY.")

§ 319. *Offer to do equity.*—In a case for the rule that he who asks equity may be required to do equity, an express offer in the bill or complaint to do such an act, specifying it, is essential, if, otherwise, the effect of a decree would be to leave it optional with plaintiff whether to enforce the decree or not;¹ but it is not essential if the relief sought is an accounting between the parties, for this itself involves the obligation to pay the balance if any.²

Nor is it essential where the decree ought to be optional,—as in case of a suit to redeem;³ nor where the complaint shows that the offer would be an empty ceremony;⁴ nor where the obligation to perform such an act is not admitted.⁵

Where an offer to pay an unliquidated sum is necessary, it is not essential to specify the sum offered, but it may be expressed as an offer to pay whatever may be found due.⁶

¹ *Davis vs. Gaines*, 104 *U. S.*, 386. (Bill to set aside judicial sale.)

United States vs. Pratt Coal and Coke Co., 18 *Fed. Rep.*, 708. (Bill to cancel land patent for fraud.)

Perry vs. Carr, 41 *N. H.*, 371. (Bill to redeem from execution sale.)

State Railroad Tax Cases, 92 *U. S.*, 575, 617; *National Bank vs. Kimball*, 103 *U. S.*, 732; *Parmeley vs. St. Louis, etc., R. R. Co.*, 3 *Dill.*, 25. (Bills to enjoin collection of taxes: part legally due must be offered.)

Silsbee vs. Smith, 60 *Barb. (N. Y.)*, 372; s. c., 41 *How. Pr. (N. Y.)*, 418. (Action to redeem from mortgage: offer held indispensable. The accounting here asked was not as to mutual transactions of the parties, but an accounting by the administratrix and widow, in order to determine the amount of liens.)

[*Contra*, *Beach vs. Cooke*, 28 *N. Y.*, 508, aff'g 39 *Barb.*, 360. (But here there was a prayer for an accounting. Moreover, the question arose at the trial, where the objection is too late. 14 *N. Y.*, 129.)]

² *Wells vs. Strange*, 5 *Ga.*, 22; *Columbian Government vs. Rothschild*, 1 *Simons*, 94, 103. (Bills for accounting:

offer no longer held necessary, because a decree against plaintiff necessarily follows if balance is against him.)]

* *Quin vs. Brittain*, 1 *Hoffm. (N. Y.)*, 353.

* *Moore vs. Crawford*, 130 *U. S.*, 122; s. c., 32 *L. ed.*, 878; 9 *Sup. Ct. Rep.*, 447. (Bill to compel conveyance; showing nothing to be due.)

* *Gage vs. Kaufman*, 133 *U. S.*, 471. (Bill to remove a cloud on title created by a tax deed; alleging that no taxes were due.)

* *Story's Eq. Pl.*, 196. (Adding that in point of practice a definite sum is commonly tendered in such cases, in order to recover costs if the sum found due falls below the sum tendered.)

ORDINANCES. [See also BY-LAWS, § 153, p. 137.]

§ 320. *How pleaded*.—In the absence of statutory provisions, an ordinance or the material part thereof¹ must be pleaded by setting forth a copy as in case of other documents,² or by setting forth the substance according to its legal effect.³

This rule applies not only to action for penalties, but to other pleadings.⁴

A general allegation that the ordinance was adopted, or that it was promulgated, etc., "in all respects as required by law," is not sufficient.⁵ Otherwise in those jurisdictions where the statutory short form for pleading the determinations of officers of limited jurisdiction is sanctioned.⁶

¹ *Green vs. Indianapolis*, 25 *Ind.*, 490.

* *Green vs. Indianapolis*, 22 *Ind.*, 192. (Action for penalty. The Court say the ordinance must be pleaded by copy, like a statute of another State.)

Harker vs. Mayor, etc., of N. Y., 17 *Wend. (N. Y.)*, 199.

* 1 *Dill. Mun. Corp.*, § 413 (346), 4th ed., p. 481. [For the rule as to documents generally, see § 226, etc.]

* *Plant vs. Wormager*, 5 *Blackf. (Ind.)*, 236. (Plea justifying trespass.)

People ex rel. Houston vs. Mayor, etc., of N. Y., 7 *How. Pr. (N. Y.)*, 81. (Alternative mandamus.)

Pomeroy vs. Lappens, 9 *Oreg.*, 363. (Return to *Hab. Corp.*)

^b *Ormsby vs. City of Louisville*, 79 *Ky.*, 197. [But compare cases as to the use of the word "duly," in § 255.] An allegation that an ordinance was enacted by a town, by its board of trustees, they being alone authorized to enact ordinances, is a sufficient averment as to what officers enacted it. *Vinson vs. Monticello*, 118 *Ind.*, 103; s. c., 19 *N. East.*, 734. And if the authority to pass it was dependent upon condition that they found it necessary, it is not needful to aver they so found. *Stuyvesant vs. Mayor*, etc., of N. Y., 7 *Cow.*, 588.

^c *City of Los Angeles vs. Waldron*, 65 *Cal.*, 283. *State ex rel. Odle*, 42 *Mo.*, 210, (holding that if municipal charter is pleaded an allegation that an election by the board was duly made covers the ordinance regulating the election.

[For the statutes and their application see §§ 277, etc., JUDGMENTS, etc.; and as to *Minnesota*, *Stat.* 1891; *Kelly*, § 4790.

OWNERSHIP. [See also ASSIGNMENT, DESCENT, HEIR, SEIZIN, SUCCESSION, and TITLE.]

§ 321. General allegation.

322. — after ownership shown in third person.

323. Evidences of title.

324. Defeasible ownership.

§ 325. Alternative source of title.

326. Ownership imports capacity to own.

327. Continuance presumed.

§ 321. *General allegation*.—A general allegation that the plaintiff was the owner of a thing,¹ or that a thing belonged to the plaintiff, or even describing the thing as "of the plaintiff,"² is sufficient on demurrer.

¹ *McAllister vs. Kuhn*, 96 *U. S.*, 87; s. c., 24 *Law ed.*, 615. (Allegation that plaintiff was the owner of specified shares represented by specified certificates.)

Souter vs. Maguire (*Cal.*, 1889), 21 *Pac. Rep.*, 183; *Murphy vs. Bennett*, 68 *Cal.*, 528; s. c., 9 *Pacif. Rep.*, 738. (Allegation that plaintiff was the owner, sufficient.)

Phoenix Ins. Co. vs. Stark (*Ind.*, 1889), 22 *North East. Rep.*, 413. (Allegation that plaintiff was "the owner," sufficient under a policy conditioned that he must be "sole and absolute owner.")

Strickland vs. Fitzgerald, 7 *Cush. (Mass.)*, 532.

² 1 *Chitt. Pl.*, 16 *Am. ed.*, 395.

Scofield vs. Whitelegge, 49 *N. Y.*, 259; s. c., 12 *Abb. Pr. N. S.*, 320, aff'g 10 *Abb. Pr. N. S.*, 104; s. c., 33 *Super.*

Ct. (J. & S.), 179; (explaining *Lewin vs. Russell*, 42 *N. Y.*, 251; and holding that "the following goods and chattels of the plaintiff," is a sufficient allegation of his ownership.)

Childs vs. Hart, 7 *Barb. (N. Y.)*, 370. (Allegation that defendant "took one piano of him the said plaintiff," sufficiently alleges ownership.)

§ 322. — *after ownership shown in third person.*—If the pleading shows ownership in a third person,—as in case of an instrument for payment of money expressly payable to a third person,—an allegation of ownership in the plaintiff is not enough, but facts showing transfer must be alleged.¹ And the objection is available under a demurrer for not stating facts sufficient to constitute a cause of action.²

¹ *Thomas vs. Desmond*, 12 *How. Pr. (N. Y.)*, 321; *Adams vs. Holley*, *id.*, 326; *Hyatt vs. McMahon*, 25 *Barb. (N. Y.)*, 457; s. p., *Brown vs. Richardson*, 20 *N. Y.*, 472; rev'g 1 *Bosw. (N. Y.)*, 402. (Bills and notes.)

McNeil vs. Supreme Commandery (Pa., 1890), 18 *Atl. Rep.*, 899. (Benefit certificate payable in terms to wife: administrator of deceased sued, alleging that it belonged to the estate, and there were no other assets to pay debts. Bad on demurrer for want of showing transfer.)

[In *Amory vs. Lawrence*, 3 *Cliff.*, 523, an allegation that complainant "procured an assignment" of the thing from the assignee in bankruptcy of the original owner, was held sufficient, without stating that the assignee had leave of court to assign. See *LEAVE*.]

² § 73.

Wilson vs. Galey, 103 *Ind.*, 257; s. c., 2 *North East. Rep.*, 736.

§ 323. *Evidences of title.*—Allegations setting forth evidences of title are not alone sufficient in place of an allegation of ownership;¹ but an allegation that the party holds title under a specified instrument, pleading it in full, is sufficient if the instrument shows title in him.² But for this purpose title in the grantor must be al-

leged;³ unless it must be presumed by law, as where the government is the grantor.

¹ *Minturn vs. Alexandre (S. D. of N. Y.)*, 5 *Fed Rep.*, 117. (Allegation that goods were consigned to libellants, and bills of lading issued to them, and of damage to them in the value of the goods by their loss,—not sufficient as an allegation of ownership.)

[*Compare Morrison vs. Lewis* 49 *N. Y. Super. Ct. (J. & S.)*, 178. (Replevin for goods bought by fraud: allegation that plaintiff sold and delivered to defendant goods, etc., sufficiently shows that plaintiff had a special property in them, and which seems sufficient to show ownership.)]

² *American Bell Tel. Co. vs. Southern Tel. Co. (U. S. Circ. Ct. E. D. Ark.)*, 34 *Fed. Rep.*, 803.

³ *May vs. First Natl. Bank*, 19 *Bradw. (Ill.)*, 604; *Gardner vs. Scoville*, 1 *How. Pr. N. S.*, 272. (Allegations of a transfer to plaintiff from a third person, without alleging ownership in such third person.)

§ 324. *Defeasible ownership*.—The fact that the ownership alleged appears to be defeasible, by conditions subsequent, does not alone impair the effect of an allegation of ownership.

Malcolm vs. O'Reilly, 46 *N. Y. Super. Ct. (J. & S.)*, 222; *s. p.*, *Schoemock vs. Farley*, 49 *id.*, 302.

§ 325. *Alternative source of title*.—Under the New Procedure a positive allegation of ownership or title is not demurrable because it states, in the alternative, two grounds or sources of title.

Marie vs. Garrison, 83 *N. Y.*, 14; *rev'g* 45 *Super. Ct. (J. & S.)*, 157. (Allegation that plaintiffs hold certain stock either in their own right or in trust, *held*, sufficient on demurrer.)

[*Compare Cresset vs. Milton*, 1 *Ves. Jr.*, 449. (Holding that an allegation of holding in right of a lease or otherwise, was demurrable.)]

§ 326. *Ownership imports capacity to own*.—An alle-

gation of ownership imports capacity to own, as against a demurrer.

Bundy vs. Cocke, 128 *U. S.*, 185; s. c., 32 *L. ed.*, 396; 16 *Wash. L. Rep.*, 810; 9 *Sup. Ct. Rep.*, 242; 5 *R. R. & Corp. L. J.*, 346. (Action to enforce, against a married woman as a shareholder in an insolvent national bank, an assessment on the stock. *Held*, that an allegation that she was the owner was an allegation that she was the lawful owner and had the capacity to own such shares.)

s. p., *Spies vs. Accessory Transit Co.*, 5 *Duer (N. Y.)*, 662.

§ 327. *Continuance presumed.*—Ownership once shown is presumed to continue.

Pryce vs. Jordan, 69 *Cal.*, 569; s. c., 11 *Pacif. Rep.*, 185.
Van Rensselaer vs. Bonesteel, 24 *Barb.*, 365; *Taylor vs. Corbiere*, 8 *How. Pr. (N. Y.)*, 385.

Compare §§ 53 and 216.

But plaintiff's allegation that he was owner at the time of commencing his action is not put in issue by an answer alleging that defendant was owner (or received the articles by transfer from plaintiff) at a previous time. *Brevoort vs. Brevoort*, 40 *N. Y. Super. Ct. (J. & S.)*, 211.

PARTNERSHIP.

§ 328. *General allegation.*—A general allegation that specified persons were partners, is an allegation of fact; and sufficient on demurrer unless the contract is set forth and fails to bear out the allegation.

Alpers vs. Schamel, 75 *Cal.*, 590; s. c., 17 *Pacif. Rep.*, 708.
s. p., *Sharp vs. Hutchinson*, 100 *N. Y.*, 533; *Abendroth vs. Van Dolsen*, 131 *U. S.*, 66; s. c., 33 *Law ed.*, 57; 9 *Supm. Ct. Rep.*, 619.

PAYMENT.

§ 329. *Payment otherwise than in money.*—An allegation that a pecuniary obligation was paid in another medium than money—as in goods or services—is insufficient unless it alleges acceptance as payment.

Corbett *vs.* Hughes, 75 *Iowa*, 281; s. c., 39 *North West. Rep.*, 500. (Answer struck out on motion.)

s. p., Jennings *vs.* Osborne, 1 *City Ct. (N. Y.)*, 195 (Mc-ADAM, J.) [citing *Morely vs. Culverhill*, 7 *Mees. & W.*, 17].

According to Ulsch *vs.* Muller, 143 *Mass.*, 379; s. c., 9 *North East. Rep.*, 736; 9 *East. Rep.*, 176, adding that it was so accepted is not enough to make out an allegation of payment. [*Contra*, Jennings *vs.* Osborne (*N. Y. City Ct.*), *N. Y. Daily Register*, Feb. 4, 1886.]

PERMISSION. [See also § 159, CONSENT.]

§ 330. *Implies knowledge and consent.*—An allegation that a thing was done “with the permission of” a party, is a sufficient allegation that it was done with his knowledge and consent.

Gray *vs.* Stienes, 69 *Iowa*, 124; s. c., 28 *North West. Rep.*, 475. (*So held* on motion for injunction in action to enjoin use of premises for liquor traffic.)

Loosey *vs.* Orser, 4 *Bosw. (N. Y.)*, 391, 404. (Escape: allegation that sheriff permitted escape, must be understood to be an escape by consent.)

[*Contra*, Toll *vs.* Alvord, 64 *Barb. (N. Y.)*, 568.]

RATIFICATION.

§ 331. *An issuable fact.*—Ratification with knowledge is an issuable fact; and a general allegation thereof is sufficient on demurrer, without stating the particulars.

Voiles *vs.* Beard, 58 *Ind.*, 510. (Allegation that infant, with full knowledge of the facts, ratified and confirmed said agreement, sufficient; judgment therefore reversed.)

REASONABLE TIME. [See also CONTRACTS.]

§ 332. Allegation necessary.

§ 334. Meaning of.

333. An issuable fact.

§ 332. *Allegation necessary.*—On a contract not so pleaded as to show that defendant agreed to perform

within a fixed time, the lapse of a reasonable time,¹ or the making of a request,² must be alleged.

¹ *Pope vs. Terre Haute Car & Manuf. Co.*, 107 N. Y., 61 ; s. c., 13 *North East. Rep.*, 592.

² *Read vs. Smith*, 1 *Allen (Mass.)*, 519.

§ 333. *An issuable fact.*—At common law, an allegation that a thing was or was not done within a reasonable time, without stating particulars, is not deemed a conclusion of law, but an allegation of fact ; and is sufficient on demurrer,¹ unless the duty or obligation in question is so dependent upon the law that the question of reasonableness would be for the Court.²

It is the better opinion that under the New Procedure, if time is material, the time should be specified.³

¹ 1 *Chitt. Pl.*, 16 *Am. ed.*, 248. (Reasonable time to allow wheat to lie on the ground after cutting.)

Id., 563. (Reasonable number of herds for pasturage.)

² *Parmalee vs. Town of Bethlehem*, 57 *Conn.*, 270, 274. (Allegation that the justice's judgment was not rendered until "long after" the expiration of the return hour, insufficient to show unreasonable delay, because the period should be stated, that the Court might see it was unreasonable.)

[*Compare* APPEARANCE ; CONTRACTS ; and DULY.]

³ See § 188, CONTRACTS ; § 318, OFFER.

§ 334. *Meaning of.*—An allegation that an act was done within a reasonable time is not equivalent to alleging that it was done promptly¹ or directly.²

¹ *Tobias vs. Lissberger*, 105 N. Y., 404, 410. (Holding that a contract to ship "promptly" admits of less delay than one to ship within a reasonable time.)

² *Duncan vs. Topham*, 8 *Com. B.*, 225.

REGULARITY. [See also § 140, APPEARANCE ; § 255, DULY ; and 277, etc., JUDGMENTS, etc.]

§ 335. *Details need not be alleged.*—In pleading a step

taken in legal proceedings in a court of general jurisdiction, it is enough to allege generally that it was duly taken, or taken according to law, or in equivalent phrase; without setting forth the particulars which show regularity; for the practice of the court and conformity thereto is matter of evidence.

Thomas vs. Cameron, 17 *Wend.* (N. Y.), 59. (Allegation as to appearance pursuant to bond.) Cited under § 140, APPEARANCE.

Ayres vs. Western R. R. Corp., 45 *N. Y.*, 260. (Holding that an allegation in a citizenship cause that the petition and bond, for removal, "were filed with the clerk of the city and county of New York according to the statute of the United States and the practice in such case made and provided," sufficiently imports that the petition and bond, etc., were presented at the time of entering the appearance.)

REPUGNANT ALLEGATIONS. [See also ALTERNATIVE ALLEGATION.]

§ 336. *Inconsistency as ground of demurrer.*—Inconsistency between two or more material allegations contained in a single cause of action or defence, is fatal on demurrer, if both cannot possibly be true as matter of fact, and either is essential to make out a sufficient case.¹ If either allegation is immaterial it may be disregarded as surplusage.²

It is the better opinion that inconsistency between separate causes of action or defences is not ground of demurrer to either, but the remedy is by compelling election, or by striking out, or by objection at the trial.³

¹ 1 *Chitt. Pl.*, 16 *Am. ed.*, 254.

For instances see *Fleischmann vs. Bennett*, 87 *N. Y.*, 231, 237; *Howell vs. Merril*, 30 *Mich.*, 283.

Compare *Hersey vs. Miller*, 77 *Cal.*, 192; s. c., 19 *Pacif. Rep.*, 375. (Holding that the demurrer must be special, for uncertainty.) [See § 119.]

Blasingame vs. Home Ins. Co., 75 *Cal.*, 633 ; s. c., 17 *Pacif. Rep.*, 925. (Allegation contradicted by exhibit : objection not available on appeal.)

[*Contra*, in mechanics' lien. *Malone vs. Big Flat Gravel Mining Co.*, 76 *Cal.*, 578, 18 *Pacif. Rep.*, 772, where an allegation of agreement for a fixed price, with a notice of lien annexed not alleging a promise, were held bad on demurrer for the discrepancy.]

² See § 97.

³ See METHOD OF TRIAL.

RULES OF COURT. See also APPEARANCE ; DULY ; JUDGMENTS, etc. ; and REGULARITY.]

§ 337. *Judicial notice*.—The trial court will take judicial notice of its own rules and regular course of proceeding, as well as of those of other superior courts of the same State, and therefore they need not be alleged in pleading.

1 *Chitt. Pl.*, 16 *Am. ed.*, 242 [citing *King vs. Bank of Gettysburg*, 2 *Rawle*, 197].

Rout vs. Ninde, 111 *Ind.*, 597 ; s. c., 13 *North East. Rep.*, 107. (*Dictum*. The decision, however, that the appellate court will not take such notice is unsound, although citing *Sandon vs. Proctor*, 7 *Barn & C.*, 800.) See *contra*, 1 *Chitt. Pl.*, 16 *Am. ed.*, 243.

[As to alleging compliance with formal rules see § 67.]

SEIZIN. [See also TITLE.]

§ 338. *General allegation*.—A general allegation that a person named was seized, or was not seized, without stating particulars, is an issuable allegation, and sufficient on demurrer ;¹ and imports possession as well as title.²

¹ *Gage vs. Kaufman*, 133 *U. S.*, 471. (Bill to quiet title.) s. p., *Wooley vs. Newcombe*, 87 *N. Y.*, 605. (Holding that, even in an action on a covenant of seizin, an allegation that defendant was not the true owner, nor was he seized, is sufficient.)

² *Gage vs. Kaufman*, 133 *U. S.*, 471 ; s. p., *Holman vs. Bank of Norfolk*, 12 *Ala.*, 369.

[Perhaps otherwise of the *actual* possession required by statute in an action to determine conflicting claims.]

SERVICE. [See also APPEARANCE; DULY; JUDGMENTS, etc.; and REGULARITY.]

§ 339. *General allegation*.—An allegation that a paper was served, imports due legal service; and is sufficient on demurrer.

Loomis vs. Brown, 16 *Barb.* (N. Y.), 325. (Action on undertaking given on the issue of an injunction: allegation that the injunction was served.)

STATUTES. [See also §§ 146–7, AUDIT; §§ 287, 288, LEAVE TO SUE; §§ 259, 260, FOREIGN LAW; §§ 277–285, JUDGMENTS, etc.]

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|---------------------------------------------------------|-------------------------------------------------|
| § 340. Public statute,—in other than penal actions. | § 346. Allegation of interpretation of effect. |
| 341. Action for penalty for an offence. | 347. Pleading in the words of a statute |
| 342. New right or remedy given by statute. | 348. <i>Private statutes</i> ;—common-law rule. |
| 343. Showing conformity to statute. | 349. — statutory short form. |
| 344. Allegation of compliance with statutory condition. | 350. — effect of this provision. |
| 345. Statutory condition in statutory action. | 351. Statutes of other States. |

§ 340. *Public statute,—in other than penal actions*.—Except for the purpose of recovering a penalty given thereby, a public domestic¹ statute may be pleaded by alleging facts making a case within the statute; and the Court must take notice of the existence and terms of the act.²

This rule applies to an act of a local and private nature which the legislature have declared to be a public act.³ And if an act is declared to be a public act, a subsequent act supplementary thereto must be treated as a public act within this rule.⁴

¹ In a State Court public statutes of the United States are

within this rule. In a Federal Court in whatever State, public statutes of all the States are within the rule. See FOREIGN LAW.

^a *Reed vs. Northfield*, 30 *Mass. (Pick.)*, 94. (In an action on the case upon a statute, brought by a party aggrieved to recover *damages* merely, the declaration need not allege that the injurious act or neglect was *contra formam statuti*. This is required only in indictments, and in actions to recover a penalty.)

[*Compare Bowie vs. Kansas City*, 51 *Mo.*, 454, 462. Holding it enough for plaintiff (a guardian) to refer in his petition to the statute under which he seeks to recover damages caused to a child by the killing of his father, as "the statute in such case made and provided.")]

Goelet vs. Cowdrey, 1 *Duer (N. Y.)*, 132; *Haight vs. Child*, 34 *Barb. (N. Y.)*, 186. (Statute of frauds.)

Yertore vs. Wiswall, 16 *How. Pr. (N. Y.)*, 8. (Action for damages by the legal representatives of a person killed.)

Brown vs. Harmon, 21 *Barb. (N. Y.)*, 508.

Miller vs. White, 8 *Abb. Pr., N. S.*, 46; s. c., less fully, 57 *Barb.*, 504. (In an action by the judgment creditor of a corporation to recover from a stockholder, upon his individual liability, the debt of the corporation, a general averment "that the defendants failed to file any such report as is required by law within twenty days of Jan. 1 in each year," is sufficient without further recital of the statutory requirement.)

Shaw vs. Tobias, 3 *N. Y.*, 188. (The declaration on a replevin bond need not aver in terms that the bond was taken pursuant to statute. It is enough if the instrument set forth is in accordance with the statute.)

Hanenstein vs. Kull, 59 *How. Pr. (N. Y.)*, 24. (Where it is alleged that a bond given by an administratrix was ordered by the surrogate to be assigned, the presumption is that it was directed to be assigned for the purpose of being prosecuted pursuant to the statute.)

Chicago & A. R. Co. vs. Dillon, 123 *Ill.*, 570; s. c., 13 *West.*, 286, 15 *N. East.*, 181. (In suing at common law where a public statute is applicable, it is not necessary to set the statute forth unless the statute remedy is cumulative and different from that at common law.)

^a *Cincinnati, H. & I. R. Co. vs. Clifford*, 13 *West.*, 384; s. c., 113 *Ind.*, 460, 15 *N. East.*, 524. (Act of incorporation declared to be public.)

People *ex rel. Caton vs. Ottawa Hydraulic Co.*, 115 *Ill.*, 281; s. c., 3 *North East.*, 413, 3 *West. Rep.*, 499. (Where the facts set forth in the information in quo warranto pleadings, when taken in connection with other facts disclosed by a statute declared by the legislature to be public, show a good title in defendants to act as a corporation, a demurrer to the petition will be sustained, although such statute has not been pleaded.)

Bowie *vs. Kansas City*, 51 *Mo.*, 454. (An act which by its terms is declared to be a "public act," and that such statute may be read in evidence in all courts of law and equity in this State, without further proof when specially pleaded, held to be a public act, and need not be pleaded notwithstanding the latter clause.)

* Hawthorne *vs. Mayor, etc., of Hoboken*, 32 *N. J. L.*, 172.

Webb *vs. Bidwell*, 15 *Minn.*, 479. (Courts will take judicial notice of a private statute which is recognized by a public act.)

§ 341. *Action for penalty for an offence.*—At common law, a statute relied on as the ground for recovering a penalty, as distinguished from damages, must be expressly referred to, as by alleging that the act complained of was contrary to the form of the statute, or other equivalent phrase,¹ and citing the statute distinctly, or, if it be a private act, properly pleading it. It is not enough to refer to different statutes without specifying which is the ground of recovery.²

It is the better opinion that, under the New Procedure, if the statute is a public domestic statute, it is enough as against demurrer to allege facts making a case within the statute,³ especially if the summons is served with the complaint and is indorsed with a specific reference to the statute.⁴

¹ Haskell *vs. Moody*, 26 *Mass. (Pick.)*, 162. (In an action *qui tam* the declaration must conclude *contra formam statuti*, or something equivalent; it is not sufficient to say an action hath accrued to plaintiff "by force of laws and acts aforesaid.")

² Fish *vs. Manning* (*D. Ct. S. D. N. Y.*), 31 *Fed. Rep.*, 340 [citing Cross *vs. U. S.*, 1 *Gall. (U. S.)*, 30; Sears *vs. U. S.*,

id., 257; *Jones vs. Van Zandt*, 2 *McLean*, 630; s. c., 5 *How. (U. S.)*, 229; *Briscoe vs. Hinman*, *Deadly (U. S.)*, 588; *U. S. vs. Babson*, *Ware (U. S.)*, 452, and holding the rule to be the same under the N. Y. Code].

* Under the Massachusetts Practice Act, which gives forms of declarations without referring to a statute, it is not necessary. *Williams vs. Inhabitants of Taunton*, 82 *Mass.*, 288.

Levy vs. Gowdy, 84 *Mass.*, 320.

Hewitt vs. Harvey, 46 *Mo.*, 368. (Intimating that under the changed rules of pleading, requiring a plain and concise statement of facts only to be pleaded, an allegation that an act was contrary to the form of statute is not required in any case.)

Schroeder vs. Becker, 22 *N. Y. Weekly Dig.*, 261. (Same effect.)

Kee vs. McSweeney, 15 *Abb. N. C. (N. Y.)*, 229; s. c., 66 *How. Pr.*, 447. (On motion to make more definite, *held*, that a complaint for an excise penalty [*L. 1857, c. 628*] need not state the particular section.)

McHarg vs. Eastman, 35 *How. Pr. (N. Y.)*, 205. (Action against a trustee of a corporation to recover penalty for failure to file a report. *Held*, that a reference to a wrong section was wholly immaterial, as such reference was surplusage.)

The provisions of the statute respecting indorsements of the summons in an action to recover penalty do not apply to the complaint; but the sufficiency of the latter is to be tested by the ordinary rules of pleading. Overseers of Poor *vs. McCann*, 20 *N. Y. Weekly Dig.*, 114.

* [*Contra*, *Fish vs. Manning* (above cited).]

Day Land & Cattle Co. vs. State, 68 *Tex.*, 526; s. c., 4 *S. West.*, 865. (In trespass to try title, objection to a petition because it is not indorsed as the statute requires, cannot be raised by general demurrer, or for the first time on appeal.)

¹ Shorter forms in penal and other actions are sanctioned in *Massachusetts Rev. Stat.*, 1882, c. 167, § 5; *Michigan, Howell's Anno. Stat.*, 1882, §§ 7341-3; c. 259, §§ 2-4; *Missouri* (see § 349, note, and *Reynolds vs. Chicago*, etc., R. Co., 85 *Mo.*, 90 [holding it enough to state the facts making a case within the statute]); and *West Virginia*, see § 349, note.

§ 342. *New right or remedy given by statute.*—Where the statute is relied on as giving a new right¹ of action,

or remedy,² or an enlarged measure of relief³ unknown to the common law, every fact necessary to bring the case within the terms of the statute must be alleged.

This rule includes facts necessary to show that the case is not within an exception of the statute, if the exception is contained in the same clause or section with the provision giving the right or remedy. Otherwise if contained only in a subsequent section.⁴

[But compare next section.]

¹ *Himmelman vs. Danos*, 35 *Cal.*, 441. (A complaint to recover an assessment for the improvement of a street must show, by either special or general averments, that the various provisions of statute were complied with.)

Ditton vs. Morgan, 56 *Ind.*, 60. (Under the Civil Damage Act a complaint is insufficient which charges a selling without showing that defendant thereby caused the intoxication.)

Bush vs. Murray, 66 *Me.*, 472. (Same point under similar statute.)

Austin vs. Goodrich, 49 *N. Y.*, 266. (Action to compel the determination of a claim to real property under § 449 *N. Y. Code Civ. Pro.*)

Beach vs. Bay State Co., 10 *Abb. Pr. (N. Y.)*, 71. (In a statutory action the cause of action must be alleged to have arisen within the State.)

[Compare *Hobbs vs. Memphis & Charleston R. R. Co.*, 12 *Heisk. (Tenn.)*, 526, holding that such fact might be presumed from the circumstances of the case.]

Burlington, etc., R. R. Co. vs. Young Bear, 18 *Nebr.*, 494; s. c., 24 *N. West. Rep.*, 377. (Defendant's answer in an action of replevin alleged saving the property, and added a claim for salvage under the State statute, but did not allege compliance with the statute. *Held*, that the answer would not have been sufficient had it relied on the right to salvage alone; but as it also alleged that the property was not unlawfully detained by defendant, nor was the plaintiff entitled to immediate possession, and this was admitted by demurrer, the presumption was that defendants had complied with the statute.)

The rule does not extend to a new right of property as distinguished from a new right of action. *Gimmy vs. Doane*, 22 *Cal.*, 635. (So stated in reference to a stat-

ute prescribing what should be common property between husband and wife, and, therefore, in an action in which the right to such property was in question, it was sufficient to describe it in the pleading as common property without alleging facts to show that it was within the statutory definition of common property. Questioning *Dye vs. Dye*, 11 *Cal.*, 163, where it was held, in reference to the same statute, that the facts must be stated, without noticing the distinction between the right of action and of property.)

* *Haskins vs. Alcott*, 13 *Ohio St.*, 210. (Under the Ohio statute permitting unincorporated companies doing business within the State to sue in the firm's name, such a company, in suing, must bring itself within the purview of the statute by an averment that it is doing business within the State.)

* *Hewitt vs. Harvey*, 46 *Mo.*, 368. (Trespass. Claim for treble damages allowed by a statute.)

* *Steel vs. Smith* (1817), 1 *Barn. & Ald.*, 94. (For penalties. Motion in arrest because the declaration did not negative an exception in the statute. BAYLEY, J., quoted TREBY, C. J., in *Jones vs. Axon*, 1 *Ld. Ray.*, 120, as follows: "Where the exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception; but where there is a clause for the benefit of the pleader, and afterwards follows a proviso, which is against him, he shall plead the clause and leave it to his adversary to show the proviso." Quoted and followed in *Teel vs. Fonda*, 4 *Johns. (N. Y.)*, 304.)

Foster vs. Hazen, 12 *Barb. (N. Y.)*, 547.

First Baptist Church vs. Utica & Sch. R. R. Co., 6 *id.*, 313. (Omission rendered the pleading insufficient to show that the act complained of was illegal and therefore a nuisance.)

Muller vs. United States, 4 *Ct. of Cl. (U. S.)*, 61.

Walker vs. Johnson, 2 *McLean (U. S.)*, 92. (Statute providing that after suit brought in probate court, no action should be brought against the executor except in case of waste, negligence, etc.)

§ 343. *Showing conformity to statute.*—In cases where there is no settled rule¹ as to pleading conformity to statute, the general rule applies that if the statute is so framed as to forbid an act "unless" or "except" a speci-

fied condition exists,—or in similar language,—compliance must be alleged.²

But if it is so framed as merely to invalidate “if” or “provided” a specified condition does not exist,—or in similar language,—compliance need not be alleged.³

[But compare the previous section.]

¹ For such specific rules see the following subjects: § 130, ACCEPTANCE; § 167, CONTRACTS, *Statute of Frauds*; § 291, LIMITATIONS; § 287, LEAVE TO SUE. See also § 267–271, ILLEGALITY.

² *Cambell vs. Wilcox*, 10 *Wall. (U. S.)*, 421. (Act of Congress providing that a promissory note should be deemed invalid when the stamp is omitted with intent to evade the provisions of the act, did not render it necessary to allege stamping.)

Stevens vs. Haskell, 72 *Me.*, 244. (Statute providing that no action shall be maintained against an executor, etc., on a claim against the estate unless such claim is first presented in writing, etc.)

Freeman vs. Fulton Fire Ins. Co., 14 *Abb. Pr. (N. Y.)*, 398; s. c., 38 *Barb.*, 247; *Williams vs. Ins. Co. of North Am.*, 9 *How. Pr. (N. Y.)*, 365. (Since the statute prohibits all wagers, and excepts only insurance for indemnity, the insured must allege his interest.)

[*Contra*, *Washburn vs. Franklin*, 28 *Barb. (N. Y.)*, 27. (Action on stock contract: allegation that plaintiff was owner of the stock he agreed to sell, not necessary, although the statute then in force made sales void unless he was owner and contract was in writing.)]

A statute prohibiting a specified defence, such as the statute forbidding corporations to interpose usury as a defence, necessarily requires that a complaint for affirmative relief upon the facts thus declared not to constitute a defence be held bad on demurrer. *Isle of Wight Co. vs. Smith*, 51 *Hum. (N. Y.)*, 562; s. c., 22 *State Rep.*, 862, 4 *Supp.* 73. (Action by a corporation to procure the cancellation and surrender of certain securities for the payment of a usurious loan. Demurrer to complaint properly sustained because by statute a corporation could not set up usury as a defence.)

§ 344. *Allegation of compliance with statutory condition.*—Where compliance with a statutory condition

precedent to the bringing of an action is required to be shown, a general allegation that "all things required to be done by the plaintiff" by the statute have been done, is not sufficient,¹ but the facts must be alleged.²

[See also §§ 146, 147, AUDIT; and §§ 287, 288, LEAVE.]

¹ *Biron vs. Board of Water Commrs.* (*Minn.*, 1889), 43 *North West. Rep.*, 482. (Statute requiring presentation of subject of action with the evidence.)

Rhoda vs. Alameda County, 52 *Cal.*, 350. (Allegation that the claim was duly presented and rejected, not enough on demurrer. Statute allowing general allegation of performance, does not apply except to conditions created by contract.)

In *Fenton vs. Salt Lake County*, 3 *Utah*, 423, and *Marshall County vs. Jackson County*, 36 *Ala.*, 613; *Schroeder vs. Colbert Co.*, 66 *id.*, 137, it was held that presentment and *disallowance* must be alleged, because specified in the statute.

[*Contra*, *Fiser vs. Railroad Co.*, 32 *Miss.*, 360. (Allegation that defendant "subscribed for twenty shares of the capital stock," etc., "according to the statute incorporating the company," etc., imports that he had done everything required by the charter in order to become a subscriber.)]

[For other cases see § 255, DULY.]

§ 345. *Statutory condition in statutory action.*—If an action is given by statute provided a specified condition exists, a complaint which does not allege facts showing performance of the condition is bad on demurrer.¹

This rule applies even though the action was given as a substitute for a common-law action.²

¹ *Adler vs. World's Pastime Exhibition Co.*, 26 *Ill. App.*, 528. (Mechanic's lien.)

Bartlett vs. Crozier, 17 *Johns. (N. Y.)*, 439.

Susenguth vs. Town of Rantoul, 48 *Wisc.*, 334. (Omission to allege notice to town of injury by defective highway.)

Benware vs. Town of Pine Valley, 53 *Wisc.*, 527. (Same omission ground for nonsuit at trial.) In the following cases the decision was put upon the ground that the

cause of action was statutory, and therefore compliance with the condition was part of the right of action. *Schroeder vs. Colbert County*, 66 *Ala.*, 137. (Statute giving action against county commissioners, but not till after presentation to them and disallowance.) *Fields vs. Hartford & W. Horse R. R. Co.*, 54 *Conn.* 9. (Action for breach of statutory duty to keep highway in order.) *s. P., State vs. Lancaster County Bank*, 8 *Nebr.*, 218. (Action against the State, given by statute.)

² *Williams vs. Hingham*, 21 *Mass.* (4 *Pick.*), 341; *Beard vs. Porter*, 124 *U. S.*, 437, 443; and *Arnson vs. Murphy*, 115 *id.*, 579.

§ 346. *Allegation of interpretation or effect.*—A demurrer does not admit an allegation of the interpretation or legal effect¹ of a domestic statute or constitution, nor an allegation that facts stated in detail were in accordance therewith or contrary thereto.²

But it does admit an allegation of the effect of a foreign statute as established by the courts of the foreign state.³

¹ *Pennie vs. Reis*, 132 *U. S.*, 464. (Allegation that police officer contributed out of his salary to the fund,—not admitted, because the statute showed it was contributed by the State.)

United States vs. Arnold, 1 *Gall. (U. S.)*, 348. (Allegation that single duties only were payable.)

Compher vs. People, 12 *Ill.*, 290. (Action upon a bond of a tax-collector. An allegation in a plea, after referring to various statutes enacted subsequent to the date of the bond, that the liability of the sureties were thereby materially changed, not admitted.)

² *Mitchell vs. Treasurer of Franklin Co.*, 25 *Ohio St.*, 143. (An averment that the auditor of the county “wrongfully and without warrant of law, and contrary to the constitution of the State,” placed the taxes sought to be enjoined, is a mere legal conclusion, and does not overcome the presumption that he placed the tax in accordance with statute.)

³ *Savings Association of St. Louis vs. O'Brien*, 51 *Hum (N. Y.)*, 45; *s. c.*, 20 *State Rep.*, 826, 3 *N. Y. Supp.*, 764. See §§ 259, 260, FOREIGN LAW.

§ 347. *Pleading in the words of the statute.*—In pleading the facts necessary to show a case within a statute, it is sufficient to allege them in the language of the statute,¹ if that language is a statement of fact, as distinguished from a conclusion of law.²

¹ *Cole vs. Jessup*, 10 *N. Y.*, 96; s. c., 10 *How. Pr.*, 524. (If the words of the statute are followed in the pleading, it is unnecessary to allege facts to bring the pleading within a judicial interpretation enlarging its literal import.)

Sullivan vs. Iron Silver Mining Co., 109 *U. S.*, 550; s. c., 27 *Law ed.*, 1028. (Allegation in the words of the act that the vein was "known to exist," enough; for the words must mean the same in the pleading as in the statute.)

Mann vs. Corrigan, 28 *Kans.*, 194. (Same effect.)

Rausch vs. Trustees of United Brethren in Christ Church, 107 *Ind.*; s. c., 4 *West. Rep.*, 720. (Under a statute allowing action to quiet title where defendant's claim to title is adverse to plaintiff, it is not essential to add an allegation that defendant's claim is untrue or wrongful or injurious to plaintiff, for this is not required by the statute.)

Fenstermacher vs. Xander, 116 *Penn.*; s. c., 10 *Atl. Rep.*, 128. (Action against wife for necessities furnished for family. Not necessary to allege that they were furnished on her credit, for this is not in the statute; although it must be proved.)

Ford vs. Ames, 36 *Hun (N. Y.)*, 571. (Action under the Civil Damage Act. A complaint alleging that the intoxication was caused by the intoxicating liquors sold or given away by the defendant, not bad on demurrer for not alleging that the sale or giving was to the person so intoxicated; for whether this be a requirement to be implied from the statute or not, it is not expressed in the language of the statute, and therefore need not be alleged. Citing *Ford vs. Babcock*, 2 *Sandf.*, 518, and distinguishing *Bush vs. Murray*, 66 *Maine*, 472; *Ditton vs. Morgan*, 56 *Ind.*, 60. Even if better pleading would require an allegation of selling or giving to the intoxicated person, it is an error or defect which should be disregarded as not affecting the defendant's substantial rights. LANDON, J., dissented on the ground that when a statute is in such general terms as to cover cases which admit both of a recovery and a non-recovery, it

does not seem too exacting to require the pleader to bring himself within the case of a recovery.)

- ² This distinction I have not seen noticed in any decision, but it is necessarily observed in practice,—as, for instance, in alleging facts showing a conveyance to be fraudulent, etc.

In *Fuqua vs. Ferrell*, 80 *Ky.*, 69, it is said that a quotation of the language of a statute does not dispense with allegation or proof of the necessary facts to make out a cause of action under the statute. See also § 54.

§ 348. *Private statutes;—common-law rule.*—At common law a private statute cannot be noticed on demurrer, unless so much of it as is essential to the case is specially pleaded in substance, or set forth in the pleading.¹

A general allegation that it was passed on a specified day is sufficient, even though the statute is such that it required more than a majority vote.²

- ¹ *Pittsburg, Cin. & St. L. Ry. Co. vs. Moore*, 33 *Ohio St.*, 384.

Goshen, etc., Turnpike Co. vs. Sears, 7 *Conn.*, 86. (Holding that it is enough, at least after verdict, if it be counted upon and substance stated.)

Atchison, Topeka & S. Fe R. R. Co. vs. Blackshire, 10 *Kans.*, 477. (Holding a railroad charter to be a private act within the rule.)

[But a municipal charter is not. *City of Covington vs. Voskotter*, 80 *Ky.*, 219.]

City of Allegheny vs. Nelson, 25 *Pa. St.*, 332. (A special act for the survey of a particular tract of land is not such a public statute as the courts are bound to notice.)

- ² *Wolfe vs. Supervisors of Richmond*, 11 *Abb. Pr. (N. Y.)*, 270; s. c., 19 *How. Pr.*, 370.

§ 349. — *statutory short form.*—Statutes in many of the States allow a private domestic¹ statute, or a right derived therefrom, to be pleaded by referring to the title and the date of passage.²

- ¹ For the rule as to statutes of sister States, and the rule in

United States Courts, see §§ 27-31; and for the rule in *Wisconsin*, see note 2, below.

Arizona—Civ. Pro., § 15. *Rev. Stats.* 1887, ¶ 663. "In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the Court shall thereupon take judicial notice thereof."

California—Civ. Pro. Deering's Anno. Code (1885), § 459. "In pleading a private statute or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage."

Colorado—Civ. Code, § 67. *Sess. Laws* 1887. (Same as *Arizona*, above, except "approval" in lieu of "passage.")

Connecticut—Gen. Stats. (1888), § 996. "All acts of incorporation passed by the General Assembly may be declared on or pleaded as public acts."

—*Id.* § 997. "In all complaints or other processes for an offence against a private act or an ordinance or by-law of any town, city, or borough, it shall be sufficient to set forth the offence in the same manner as in cases of offences created by a public act."

Florida—McClellan's Dig., 1881, c. 162, § 120. "Printed copies of private acts of the General Assembly may be given in evidence in any judicial proceeding without being specially pleaded."

Idaho—Civ. Pro. Rev. Stats. 1887, § 4214. (Same as *California*, above.)

Indiana—Civ. Pro. Rev. Stats. 1888, § 371 (121), (85). (Same as *Arizona*, above, except "approval" in lieu of "passage," and omitting "thereupon.")

Iowa—Rev. Code 1888, § 2708. (Same as *Arizona*, above.)

Kansas—Civ. Pro., § 124. *Gen. Stats.* 1889, § 4207. (Same as *Arizona*, above, except "approval" in lieu of "passage.")

Kentucky—Codes (Carroll), § 119 [144]. "1. Neither the evidence relied on by a party, nor presumptions of law, nor facts of which judicial notice is taken, excepting private statutes, shall be stated in a pleading.

"2. In pleading a private statute, it shall be sufficient to refer to it by stating its title and the day on which it became a law."

Minnesota—Stats. (Kelly) 1891, § 4791. (Same as *Arizona*, above, except "approval" in lieu of "passage.")

Mississippi—Rev. Code, 1880, c. 58, § 1572. "If a private statute be pleaded, it shall be sufficient to refer to it by its title and the date of its passage."

Missouri—Code Civ. Pro. Rev. Stats. 1889, § 2077. (Same as *Arizona*, above.)

- *Code Civ. Pro. Rev. Stats.* 1889, § 2078. "It shall not be necessary, in any pleading, to set forth any statute, public or private, or any special matter thereof; but it shall be sufficient for the party to allege therein that the act was done by the authority of such statute, or contrary to the provisions thereof, naming the subject-matter of such statute, or referring thereto, in some general terms, with convenient certainty."
- Montana*—*Code Civ. Pro. Comp. Stats.* 1887, § 106. (Same as *Arizona*, above.)
- Nebraska*—*Code Civ. Pro.*, § 130 *Comp. Stats.* (Same as *Arizona*, above.)
- Nevada*—*Civ. Pro.*, § 61. *Gen. Stats.* 1883, § 3083. (Same as *Arizona*, above.)
- North Carolina*—*Civ. Pro. Code*, 1883, § 264. (Same as *Arizona*, above, except "ratification" in lieu of "passage.")
- North Dakota*—*Civ. Pro. Comp. L.* (1887), § 4928. (Same as *Arizona*, above.)
- Ohio*—*Rev. Stats. (S. & B.)* 1890, § 5092. (Same as *California*, above.)
- Oregon*—*Code Civ. Pro.*, § 88. *Hill's Anno. Laws*, 1887. (Same as *Arizona*, above.)
- South Carolina*—*Code Civ. Pro.*, § 184. *Gen. Stats.* 1882. (Same as *Arizona*, above.)
- South Dakota*—*Civ. Pro. Comp. L.* 1887, § 4928. (Same as *Arizona*, above.)
- Utah*—*Code of Civ. Pro.*, § 329. *Comp. Laws* 1888, § 3245. (Same as *Arizona*, above.)
- Washington*—*Code* 1881, § 98. (Same as *Arizona*, above.)
- West Virginia*—*Code* 1887, c. 130, § 1. "Acts and resolutions of the legislature, though local or private, may be given in evidence without being specially pleaded; and an appellate court shall take judicial notice of such as appear to have been relied on in the court below."
- Wisconsin*—*Sanborn & Berryman's Anno. Stats.* (1889), § 2676. "In pleading a private statute or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the Court shall thereupon take judicial notice thereof. In like manner the statutes, acts, and resolves of the Congress of the United States, and of the legislature of any State or Territory of the United States, published by authority of the respective governments thereof, may be pleaded."
- Wyoming*—*Rev. Stats.* 1887, § 2479. (Same as *California*, above, except "If" instead of "In" and "shall be" instead of "is" "sufficient.")

§ 350. — *effect of the statutory provision.*—These provisions are permissive; and pleading a private statute by setting it forth is still good.¹

But the provision does not apply to a statute of a sister State.²

If complied with, the statute is deemed a part of the complaint as fully as if set forth therein.³

¹Central Trust Co. *vs.* Burton (*Wisc.*, *Sep.*, 1889).

²Green *vs.* City of Indianapolis, 22 *Ind.*, 192. [Otherwise of *Wisconsin*.]

³Territory *vs.* Virginia Road Co., 2 *Mon. Ty.*, 96.

§ 351. *Statutes of other States.*—It is the better opinion that, under the New Procedure, pleading a statute of another State or country by its legal effect is sufficient on demurrer.

Cases cited under § 259.

Robarge *vs.* Central Vt. R. Co., 18 *Abb. N. C.*, 363; Kipp *vs.* McLean, 2 *N. Y. Civ. Pro. R. (McCarty)*, 166; Schluter *vs.* Bowery Savings Bk., 117 *N. Y.*, 125.

[*Contra*, Carey *vs.* Cin. & Chi. R. Co., 5 *Iowa*, 357; Swank *vs.* Huffnagle, 111 *Ind.*, 453; s. c., 12 *North East. Rep.*, 303, 9 *West.*, 629.

SUCCESSION. [See also § 225, DESCENT; § 266, HEIR; § 338, SEIZIN.]

§ 352. *General allegation.*—An allegation that a party succeeded to and became possessed of a specified property is sufficient on demurrer.

Curtiss *vs.* Livingston, 36 *Minn.*, 380; s. c., 31 *North West. Rep.*, 357. (So holding although, the interest being a life estate, it was necessary to understand the allegation as meaning an assignment.)

TENDER.

§ 353. *Interest.*—An allegation of a tender “with in-

terest" at a specified rate for a specified period, is sufficient without mentioning the amount of the interest.

St. Paul Div. No. 1 *vs.* Brown, 9 *Minn.*, 157, 164. (*Id certum est quod certum reddi potest.*)

THEREUPON.

§ 354. "*Thereupon*" does not exclude other causes.—The words "and thereupon" used to connect two events alleged in pleading, signify their succession in time, but do not negative the existence of intervening facts not stated.¹

Dennehey vs. Woodsum, 100 *Mass.*, 195. (Malicious prosecution. Allegation that defendant made a criminal charge and testified falsely, and thereupon plaintiff was convicted. *Held*, that this did not amount to an allegation that there was no other testimony.)

TIME. [See also DATE.]

§ 355. *Implied in allegations without dates.*—Unless the context indicates otherwise, an allegation expressed in the *present tense* in a verified pleading is understood to relate to the time when the pleading was verified; in an unverified pleading, to the time it bears date,¹ or the time when it was made effectual by filing or serving.²

It cannot avail as referring to a time before the commencement of the action.³

An allegation in the *past tense* may be understood as referring to a time before the action was commenced,⁴ except when contained in an answer or reply and intended to refer to the time indicated in the pleading to which it responds.⁵

¹ *Prindle vs. Caruthers*, 15 *N. Y.*, 425, 426. (Allegation that the person on whose life the contract sued on depended "is living," must be deemed to relate to the time of verification. Error to sustain demurrer.)

Scott vs. Royal Exch. Shipping Co., 5 *Monthly Law Bul.* (N. Y.), 64. (Answer stricken out as sham.)

* Burns vs. O'Neil, 10 *Hun* (N. Y.), 494. (Allegation that the parties "are residents," etc., in a complaint served with summons, sufficient to show residence at the commencement of the action.)

* Wheeler vs. Heermans, 3 *Sandf. Ch.* (N. Y.), 597. (In creditor's suit, allegation that the defendant "resides" in a specified county has reference to the time of filing the bill and not to the time of issuing the execution before commencing the suit.)

Coulson vs. Whiting, 14 *Abb. N. C.* (N. Y.), 60 (*Dictum.*)

Broome vs. Taylor, 9 *Hun* (N. Y.), 155. [Rev'd on another ground in 76 *N. Y.*, 564.]

[Compare §§ 124-126.]

* Prentice vs. Ashland County, 56 *Wisc.*, 345. (Allegation that an act was done on a certain day, implies that the action was not premature; for it must be presumed that the action was commenced after that day.)

* Heebner vs. Townsend, 8 *Abb. Pr.* (N. Y.), 234.

Eberly vs. Moore, 24 *How.* (U. S.), 147, 157. (Action of trespass in United States Court. Plea in abatement alleging that the allegation of citizenship in plaintiffs' petition "is" not true; that said plaintiffs "are" not citizens of Kentucky, but "are" respectively citizens of Texas,—*held*, not a nullity, though informal; and plaintiff was not entitled to judgment.)

Compare *Townshend vs. Norris*, 7 *Hun* (N. Y.), 239, (holding the phrase "was alone invested with any right or title to the cause of action set forth in the complaint," must be construed to refer to the time of the commencement of the action, to which all similar averments, whether in form in the present or past tense, are held to refer.)

TITLE. [See also ASSIGNMENT, DESCENT, HEIR, OWNERSHIP, SEIZIN, and SUCCESSION.]

§ 356. General allegation.

§ 358. Title under statute.

357. Derivation of title; with or without general allegation.

359. "Entitled," a mere conclusion.

§ 356. *General allegation.*—Under the New Procedure, an allegation that a person is seized in fee or is the owner in fee, or in equivalent language, without stating the source or particulars of title, is sufficient on demurrer, in the absence of any statute requiring source or particulars of title to be stated.¹

But it is not sufficient as a denial of an adverse title, the source and particulars of which are pleaded by the adverse party and have not been denied.²

¹ *Ratliff vs. Stretch*, 117 *Ind.*, 526; s. c., 20 *North East. Rep.*, 438. (Action to quiet title. *Held*, that the remedy for the defect, if the pleading is not sufficiently specific, is by motion to make more specific, and not by demurrer.)

L. L. & G. R. Co. vs. Leahy, 12 *Kans.*, 124. (Tax injunction.)

Commissioners of Saline Co. vs. Young, 18 *Kans.*, 440, 445. (Action for recovery of amount of illegal taxes.)

Butrick vs. Tilton, 141 *Mass.*, 93; s. c., 6 *North East. Rep.*, 563. (Writ of entry for possession of land: allegation that demandants were "seized in their demesne as of fee" equivalent to "seized in fee simple.")

Daley vs. City of St. Paul, 7 *Minn.*, 390. (Action for damages by opening street.)

Wainman vs. Hampton, 110 *N. Y.*, 429. (Partition.)

Richards vs. Smith, 98 *N. C.*, 509; s. c., 4 *South. East. Rep.*, 625. (Action to recover land. Substituted plaintiffs may prove their own title under allegation by original plaintiff that he was owner.)

[*Compare De Silva vs. Flynn*, 9 *Civ. Pro. R. (N. Y.)*, 426. (Allegation that premises *equitably* belonged to A., and that whatever title B. had he held for them, *held* insufficient for want of facts.)]

At common law a party claiming a particular estate must, when title is of the gist of the action and not mere inducement, state the derivation of his title. *Gould Pl.*, 52. 1 *Chitt. Pl.*, 16 *Am. ed.*, 377.

In chancery, if plaintiff claims under a derivative title, he must set forth the grounds thereof or his bill is demurrable; unless there is an existing privity between the plaintiff and defendant, independently of the plaintiff's title, which gives the plaintiff a right to maintain the suit,—as, for example, if they are landlord and tenant, or mortgagor and mortgagee,—and then it is not necessary to state the plaintiff's title fully in the bill. *Story's Eq. Pl.*, 250, *etc.*; *Muir vs. Leake & Watts Orphan House*, 3 *Barb. Ch. (N. Y.)*, 477; *Goldsmith vs. Gilliland*, 22 *Fed. Rep.*, 865, 868; *Marshall vs. Turnbull*, 34 *id.*, 827; *Greenwalt vs. Duncan*, 16 *id.*, 35; 1 *Dan. Ch. Pr.*, 4 *Am. ed.*, 370; *Houghton vs. Reynolds*, 2 *Hare*, 266; *Cresset vs. Milton*, 1 *Ves. Jun.*, 449.

² See § 463, *Demurrer to answer*.

§ 357. *Derivation of title;—with or without general allegation.*—A statement of facts showing title, is sufficient without adding a general allegation of ownership.¹

If facts relied on to show title are stated, and show defective title, the addition of a general allegation of title by virtue thereof will not cure the defect.²

¹ *Day Land & Cattle Co. vs. State*, 68 *Tex.*, 526; s. c., 4 *South West. Rep.*, 865. (Holding that in a suit by the State, when the petition sets up facts which entitle the State to the lands, a distinct averment to that effect is unnecessary.)

² *Van Schaick vs. Winne*, 16 *Barb. (N. Y.)*, 89; *Lawrence vs. Wright*, 2 *Duer. (N. Y.)*, 673; *Turner vs. White*, 73 *Cal.*, 299; s. c., 14 *Pacif. Rep.*, 794; *Laffey vs. Chapman (Colo.)*, 12 *Pac. Rep.*, 152. (Allegation of conveyance, etc., not showing title in plaintiff, not aided by adding that “by virtue of said conveyance” plaintiff became owner, etc.)

Spencer vs. McGonagle, 107 *Ind.*, 410, 5 *West. Rep.*, 663. (Partition: cross-complaint deraigning defendant’s claim but not showing good title.) Followed in *McPheeters vs. Wright (Ind., 1887)*, 8 *West. Rep.*, 575.)

Pinney vs. Fridley, 9 *Minn.*, 34.

[*Contra*, *Masterson vs. Townshend*, 23 *State Rep.*, 626; s. c., 5 *N. Y. Supp.*, 182. (Holding, in ejectment, that where the complaint states facts tending to show title, which are not inconsistent with a fee-simple in the plaintiff, and then alleges “that by reason of the matters hereinbefore set forth plaintiff became and is now seized in fee of an undivided interest” in the premises, the allegation is sufficient on demurrer. Citing *Steph. Pl. (5th Amer. Ed.)*, 305, 306.)]

§ 358. *Title under statute.*—An allegation by a public corporation that they are owners of the fee under the provisions of a public statute which confers power of eminent domain, sufficiently implies compliance with the terms of the statute under which the fee was claimed.

Brooklyn vs. Copeland, 106 *N. Y.*, 496; s. c., 9 *Centr. Rep.*, 290, 13 *N. East. Rep.*, 451. (*So held* in determining the defect at the trial of a mere denial that the act was competent to vest title.)

Chicago, B. & Q. R. Co. *vs.* Porter, 72 *Iowa*, 426; s. c., 34 *N. West. Rep.*, 286. (Action to enjoin the former owner or a purchaser from him from obstructing construction of the road.)

[*Compare* *Ducie vs. Ford*, 8 *Mont.*, 233; s. c., 19 *Pacif. Rep.*, 414. (Specific performance of agreement to share in mining claim. Demurrer sustained because an allegation that the mining laws had been complied with by plaintiff, and of his possession and ownership of the claim, were merely legal conclusions. He should have set forth every fact necessary for him to prove in order to have succeeded in his adverse claim, had he filed one.)]

[In *Crocket vs. Lee*, 7 *Wheat.*, 522, an allegation that a survey had "not been made agreeable to location or to law" was *held* to draw in question only the existence of the survey, and not its validity or fatal vagueness, nor did it controvert the whole location or entry.]

§ 359. "*Entitled*," a mere conclusion.—An allegation that a party is or was "entitled to" a thing, without stating ownership, is a mere conclusion of law, and insufficient on demurrer.

Garner vs. McCullough, 48 *Mo.*, 318. (Trespass: "entitled to the exclusive possession of the premises," bad.) *Sheridan vs. Jackson*, 72 *N. Y.*, 170, aff'g 10 *Hun*, 89 ("entitled to possession" of land and to the rents and profits, bad); *Patterson vs. Adams*, 7 *Hill (N. Y.)*, 126 (replevin: "entitled to the possession of," etc., bad); *Phinney vs. Phinney*, 17 *How. Pr. (N. Y.)*, 197 (entitled under the laws of another country to specified property, bad).

Brown vs. Phillips, 71 *Wisc.*, 239. ("Entitled to vote" at an election, bad.)

TORTS. [See also CONFEDERACY, CONSPIRACY, DETENTION, and NEGLIGENCE.]

§ 360. Wilfulness sometimes essential. § 362. "Wrongful" and "unlawful,"

361. "Wilful," an allegation of fact. mere conclusions.

363. Malice.

§ 360. *Wilfulness sometimes essential*.—Where the plaintiff relies on the wilfulness of the wrong, in order to sustain an action notwithstanding he was a trespasser¹

or notwithstanding contributory negligence on his own part,² wilfulness must be distinctly alleged.³

¹ *Belt Railroad & Stock Yard Co. vs. Mann*, 107 *Ind.*, 89; s. c., 7 *North East. Rep.*, 893; s. c., 5 *West.*, 314. (Allegation of "gross and wilful negligence," insufficient, as against a plaintiff not alleging freedom from contributory negligence.)

² *Chicago & Eastern Illinois R. R. Co. vs. Hedges*, 105 *Ind.*, 398; s. c., 7 *North East. Rep.*, 801; s. c., 3 *West.*, 893. (Allegation of "gross negligence and recklessness," in running the train, not enough to show wilfulness or purpose in killing plaintiffs' intestate.)

³ *Sherfey vs. Evansville & T. H. R. Co.* (*Ind.*, 1890), 23 *North East. Rep.*, 274. ("Wilful, careless, and unlawful," held not enough where there was nothing to show that the servants in charge of the train knew that plaintiff was on the track.)

§ 361. "*Wilful*," an allegation of fact.—An allegation that an act was wilfully done is sufficient;¹ unless details are stated and they indicate that it was merely negligence.²

But an allegation that an act was wilful, without alleging scienter, is not necessarily equivalent to an allegation that the injury was wilful.³

¹ See INTENT.

² *Louisville, N. A. & C. Ry. Co. vs. Schmidt*, 106 *Ind.*, 73; s. c., 5 *North East. Rep.*, 684, 3 *West.*, 648.

³ *Sherfey vs. Evansville, etc., R. Co., and Chicago, etc., vs. Hedges*, cited under last section.

§ 362. "*Wrongful*" and "*unlawful*" mere conclusions.—An allegation that an act was wrongful or unlawful, or both, is a mere conclusion of law, and insufficient on demurrer.

Scofield vs. Whitelegge, 49 *N. Y.*, 259, 261; s. c., 12 *Abb. Pr. N. S.*, 320. (Replevin: allegation "that defendant wrongfully detains," etc., with no allegation of

plaintiff's right or title, a mere conclusion of law, and insufficient even though put in issue.)

Tronson vs. Union Lumbering Co., 38 *Wis.*, 202.

Schroeder vs. Beeker, 22 *N. Y. Weekly Dig.*, 261. (Action for statute penalty: allegation that defendant's act "was wrongful and unlawful," not sufficient.)

Lange vs. Benedict, 73 *N. Y.*, 12, 24. (Allegation that defendant wrongfully, wilfully, and without jurisdiction, falsely imprisoned plaintiff,—not admitted by demurrer, if the facts are also stated and do not show wrongfulness.)

Dritt vs. Snodgrass, 66 *Mo.*, 286.

[*Compare McAllister vs. Kuhn*, 96 *U. S.*, 87, 89; s. c., 24 *Law. ed.*, 615. ("That defendant wrongfully took said shares and converted them unlawfully and wrongfully to his own use," held sufficient.)

§ 363. *Malice*.—Where malice is of the gist of the action, an allegation of facts only tending to show malice, without a direct allegation of malice, is not enough.¹ But if facts are alleged constituting malice as matter of law,—such as the utterance of actionable words, alleged to be false,—it is not necessary to add the word "malice" or "maliciously."²

The word "malice" is not essential as a technical term, in any case. A distinct allegation of wrongful intent may be deemed equivalent.³

¹ *Dauchy vs. Salisbury*, 29 *Conn.*, 124. (Action for excessive levy, etc.)

² *Hunt vs. Bennett*, 19 *N. Y.*, 173, aff'g 4 *E. D. Smith*, 647. (Holding that if the matter charged is libelous as matter of law, an allegation that it was false and malicious is unnecessary; and if it were necessary, an allegation that it was a libel is a sufficient allegation of falsehood and malice.)

Compare, to same effect, *Fry vs. Bennett*, 5 *Sandf.*, 54; s. c., 9 *N. Y. Leg. Obs.*, 330; less fully, 1 *Code R., N. S.*, 238.

s. p., *Dodge vs. Colby*, 108 *N. Y.*, 445; s. c., 11 *Cent. Rep.*, 466, 15 *North East. Rep.*, 703, rev'g 37 *Hun*, 515. (Holding that in charging slander of title, an allegation that the slanderous statements were false and made maliciously and with intent to injure the plaintiff and

his title, is sufficient on demurrer.) [Whether, if the facts alleged do not show malice, a mere general allegation of malice is enough, query? Compare *Viele vs. Gray*, 10 *Abb. Pr.*, 1; s. c., 18 *How. Pr.*, 550; *Caldwell vs. Raymond*, 2 *Abb. Pr.*, 193.]

- *1 *Chitt. Pl.*, 16 *Am. ed.*, 405; *Mallett vs. Beale*, 66 *Iowa*, 70; s. c., 23 *North West. Rep.*, 269. (Assault.)
Sherman vs. Kortright, 52 *Barb. (N. Y.)*, 267. (Action for obstruction of highway: such allegation by plaintiff held to enable defendant to show absence of malice.)
 Whether malice in the assertion of a legal right is material, see *Abb. Brief on the Facts*, §§ 540, 541.

TRUSTEES.

§ 364. *Preliminary request to trustee, etc., to sue.*—The omission of a beneficiary or stockholder to request his trustees, or the corporation or directors, to sue for the same cause, as a preliminary to bringing an action himself, is available as an objection under a demurrer, assigning as ground that the complaint does not state facts sufficient to constitute a cause of action.

- Greaves vs. Gouge*, 69 *N. Y.*, 154.
Hawes vs. Oakland, 104 *U. S.*, 450, *U. S. Supreme Ct. Rule in Eq.*, No. 94.
Smith vs. Rathbun, 22 *Hun. (N. Y.)*, 150.
Davies vs. N. Y. Concert Co, 41 *id.*, 492. (Request limited to a different ground.)

USAGE.

§ 365. Necessity of pleading.

§ 366. Form of allegation.

§ 365. *Necessity of pleading.*—A general custom or usage, such as may be judicially noticed,¹ may be noticed on demurrer without being alleged. A local custom, or usage of a particular trade, cannot be.²

¹ *Bank of Columbia vs. Fitzhugh*, 1 *Harr. & G. (Md.)*, 239, 248.

Templeman vs. Biddle, 1 *Harr. (Del.)*, 522.

What are such usages, see *Brief on Facts*, § 202, § 727, etc.

² *Wallace vs. Morgan*, 23 *Ind.*, 399, 403. (Usage of a trade.)
Dutch, etc., Co. vs. Mooney, 12 *Cal.*, 534. (Miners' customs.)

Templeman vs. Biddle (above cited). (Local custom as to crops.)

§ 366. *Form of allegation*.—Usage or custom in a particular trade should be shown to be general or uniform, and to have existed for a proper time to bind the party against whom it is pleaded, unless he is alleged or must be presumed to have dealt with knowledge of it.

Wallace vs. Morgan, 23 *Ind.*, 399, 403. (Usage or custom of a particular trade, much in conflict with general principles, should be fully stated. An allegation that "by the usage and custom" of such a trade in the place in question flour not suitable for market there was forwarded to N. Y.,—*held*, bad for not stating that it was general or uniform among such merchants, or had existed for any considerable period, or existed at the date of the transaction in suit.)

WILL.

§ 367. *Allegation of making*.—An allegation that a person named made and executed, on a day named, his last will and testament, in accordance with the laws of the State of, etc. (that being a State of whose laws the Court must take notice), is, on demurrer, a sufficient allegation of the making of a legal will.

Norris vs. Norris, 63 *How. Pr. (N. Y.)*, 319, 325. (VAN VORST, J. Complaint in equitable action under Code.)

So an allegation that there was an instrument in writing purporting to be the last will and testament of M., deceased, and to be duly executed and attested; that it was admitted to probate as a will of real and personal estate, and letters testamentary were issued, and the executors took upon themselves the execution,—sufficiently shows the instrument was a will, and had been so adjudged. *Mason vs. Jones*, 13 *Barb. (N. Y.)*, 461 (bill in equity); to somewhat similar effect, *Van Cortlandt vs. Beekman*, 6 *Paige (N. Y.)*, 492.

VIII.—DEMURRER FOR WANT OF JURISDICTION.

[The subject here treated is defect of jurisdiction over the present action. Demurrer because a pleading setting up proceedings had in another cause does not show that the Court in which they were, had jurisdiction, must be on the ground of insufficiency, and is treated under §§ 259, 260, FOREIGN LAW, and §§ 277–283, JUDGMENTS, etc., and under DEMURRER TO ANSWER.]

1. *General Principles.*

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|--------------------------------------------------------|------------------------------------------------------------|
| § 368. Meaning of “jurisdiction. | § 371. Statutory prohibition. |
| 369. Form of assigning ground. | 372. New York Superior City Courts and Surrogate’s Courts. |
| 370. What is “appearing on the face of the complaint.” | 373. Several causes of action. |

2. *Jurisdiction of Subject-matter.*

- § 374. Place where cause of action arose.

3. *Federal Question.*

- § 375. Federal question.

4. *As affected by the Amount involved.*

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|--------------------------------------------------------------------------------|-------------------------------------------------------------------|
| § 376. Apparent want of jurisdiction. | § 379. Combining several causes of action between same parties. |
| 377. <i>Minimum amount</i> ; “value,” in actions other than for money demands. | 380. Combining joint or several interests of different claimants. |
| 378. — in actions for money demands. | 381. Form of allegation. |
| | 382. <i>Maximum amount</i> as a limit. |

5. *Citizenship Cases in Federal Courts.*

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|-----------------------------------------------|-------------------------------------------------------------|
| § 383. Demurrer lies. | § 388. Time of citizenship. |
| 384. Direct allegation. | 389. Suit by assignee. |
| 385. — as to corporation. | 390. Citizenship in Federal Court not a personal privilege. |
| 386. Form of allegation. | 391. Ranging parties to affect jurisdiction. |
| 387. Description in title or in introduction. | |

6. *As affected by Defendant's Residence.*

- § 392. Defendant sued out of his district.
 393. Defendant's inhabitancy.
- § 394. Foreign corporation.
 395. No waiver by qualified appearance.

1. GENERAL PRINCIPLES.

§ 368. *Meaning of "jurisdiction."*—It is the better opinion that, under the New Procedure, since the merger of legal and equitable jurisdiction in the same Court, a demurrer for want of jurisdiction does not avail, in an action of an equitable nature, to raise the objection that there is an adequate remedy at law.

See §§ 110-118.

Nor is it available on demurrer for insufficiency if any appropriate legal relief is asked. See §§ 120-123.

In Equity, however, a demurrer on the ground of adequate remedy is said to be "in fact to the jurisdiction of the Court." *Lynch vs. Willard*, 6 *Johns. Ch. (N. Y.)*, 342. And this rule was followed, without, however, discussing the question, in an early case under the Code. *Wilson vs. Mayor*, etc., of N. Y., 6 *Abb. Pr. (N. Y.)*, 6: s. c., 15 *How. Pr.*, 500.

§ 369. *Form of assigning ground.*—A demurrer for want of jurisdiction must state whether the alleged want of jurisdiction relates to the subject of the action, or to the person of the defendant.

Getty vs. Hudson River R. Co., 8 *How. Pr. (N. Y.)*, 177, 182. (*Dictum.*)

§ 370. *What is "appearing on the face of the complaint."*—In an action in a court of record of limited and inferior jurisdiction, a complaint is bad on demurrer which does not affirmatively show the facts—such as residence of a party—on which jurisdiction of the subject-matter depends.¹ The omission constitutes a de-

fect of jurisdiction appearing on the face of the complaint: because it is a settled rule of pleading that "nothing shall be intended to be without the jurisdiction of a superior court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged."²

A court of local jurisdiction only in specified classes of cases, and to a limited amount, is a court of limited and inferior jurisdiction within this rule.³

¹ *Gilbert vs. York*, 111 N. Y., 544; aff'g 41 Hun, 594. s. p., *United States vs. Clarke*, 8 Pet. (U. S.), 436; s. c., 8 Law ed., 1001. (Proceedings in Superior Court of East Florida, under an act of Congress providing for the adjudication of claims to land in Florida granted under its former sovereignty.)

So held also of statutes giving a court of general jurisdiction at law, equitable jurisdiction in special classes of cases. *May vs. Parker*, 29 Mass. (Pick.), 34; *Woodman vs. Saltonstal*, 7 Cush. (Mass.), 183.

For qualifications of the above rule in the case of Courts of the United States, see §§ 375-392.

² *Gilbert vs. York* (above cited), citing 1 Saund., 73.

³ *Gilbert vs. York* (above cited), so holding of N. Y. County Courts whose jurisdiction is limited to \$2,000 in specified cases.

[*Compare Powers vs. Ames*, 9 Minn., 178, applying the other rule to a "District Court." And *Turberville vs. Long*, 3 Hen. & M. (Va.), 309, where the Court say: "The necessity of averring jurisdiction of a court ought to be confined to cases arising within the narrow limits of those inferior jurisdictions and not extended to Superior or even County Courts."]

[The rulings on this question in various States are very diverse, the statutes, and the view as to what is an inferior court, varying.]

§ 371. *Statutory prohibition*.—A statute in form forbidding a court to take cognizance of a cause unless the plaintiff shall have complied with specified conditions, may sustain a demurrer to the jurisdiction, if the court

be of special and limited jurisdiction, and compliance be not alleged; although it is the better opinion that a statute in form only forbidding an action to be maintained except on condition, does not necessarily go to the jurisdiction of a court of general jurisdiction.

Berry vs. Cammet, 44 *Cal.*, 347. (Statute not allowing action between applicants for the purchase of public lands until certain proceedings have been taken before the surveyor-general.) Compare § 394.

§ 372. *New York Superior City Courts*.—In the New York Superior City Courts, although their jurisdiction is territorially limited, the jurisdictional facts need not be alleged, but are presumed.

Spencer vs. Rogers Locomotive Works, 17 *Abb. Pr. (N. Y.)*, 110; s. c., 8 *Bosw. (N. Y.)*, 612.

N. Y. Code Civ. Pro., § 263.

Fisher vs. Charter Oak Life Ins. Co., 52 *N. Y. Super. Ct. (J. & S.)*, 179, aff'g 14 *Abb. N. C.*, 32.

§ 373. *Several causes of action*.—A demurrer to a whole complaint for want of jurisdiction of the subject is not sustainable, if the court has jurisdiction of any one of several causes of action stated therein.

Cook vs. Chase, 3 *Duer (N. Y.)*, 643.

s. p., *Allen vs. Wilmington & W. R. Co.*, 102 *N. C.*, 381; s. c., 9 *South East. Rep.*, 4.

2. JURISDICTION OF SUBJECT-MATTER.

§ 374. *Place where cause of action arose*.—As to what is to be deemed the arising of a cause of action within the rule as to place, as giving jurisdiction, see:

Clark vs. Eddy (Wash. Co. C. P., Ohio), *Cinn. L. Bul.*, July 29, 1889, reviewing cases.

Alderton vs. Archer, *L. R.*, 14 *Q. B. D.*, 1; s. c., 54 *L. J.*, *Q. B.*, 12; 33 *W. R.*, 136; 51 *L. T.*, 661.

Bryan vs. University Publishing Company of New York, 112 N. Y., 382. (Holding that the cause of action against the transferee, in another State, of copyrights of a debtor in a judgment recovered here, was a cause of action arising in such other State. So *held* on the question of the validity of service of summons by publication. EARL, J., RUGER, Ch.J., and FINCH, J., dissented.)

As to foreign torts between non-residents, see *Tupper vs. Morin*, 25 Abb. N. C. (N. Y.), 328; *Burdick vs. Freeman*, 120 N. Y., 429.

3. FEDERAL QUESTION.

§ 375. *When sufficiently shown*.—To give a Court of the United States jurisdiction, a contention on the construction or effect of a provision of the Constitution or laws of the United States, though raised on demurrer before issue joined, may be sufficient within the rule that the pleadings must show that such a question is necessarily involved.

Smith vs. Greenhow, 109 U. S., 669.

Booth vs. Lloyd, 33 Fed. Rep., 593. (Plaintiffs alleged that their property had been seized under color of a State law, which was alleged to be void as against the Federal Constitution. *Held*, on demurrer to a plea to the jurisdiction on the ground of citizenship, that a Federal question was sufficiently presented in the declaration without formally alleging that the circumstances of the arrest were such as to call forth the operation of the State law.)

4. AS AFFECTED BY THE AMOUNT INVOLVED.

§ 376. *Apparent want of jurisdiction*.—Where it affirmatively appears by the face of the pleading that the amount involved is not sufficient to give jurisdiction, a demurrer lies.

Smet vs. Williams, 4 Paige (N. Y.), 364.

Allen vs. Demarest, 41 N. J. Eq., 162; s. c., 3 Cent. Rep., 79.

§ 377. *Minimum amount*.—"Value" in actions other

than for money demand, etc.—In a Court of general jurisdiction, not having cognizance of a cause involving less than a specified amount, the failure of the plaintiff's pleading to show the value of the subject-matter of the controversy, in cases where the demand is not for money, and the nature of the action does not require the value to be stated, is not a ground for demurrer.¹

If, however, in such a case the value is alleged, it will control,² unless the allegation appear to have been designedly exaggerated.

It is the better opinion that the same principle applies in the Circuit Courts of the United States.³ And even if the value must be shown, the Court may on the argument receive affidavits to the value, to meet the objection that jurisdiction does not appear by the pleading.⁴

¹ *Thomas vs. McEwen*, 11 *Paige* (N. Y.), 131.

Doll vs. Feller, 16 *Cal.*, 432. (In courts of general jurisdiction the cause of action need only be stated, and the want of jurisdiction arising from insufficient value of the premises sued for must be taken advantage of in some other way than by demurrer.)

[*Compare Burke vs. Grace* (Cinn., 1885), 4 *Atl. Rep.*, 257. (Ejectment, demanding judgment for \$500, and possession, not enough to show that the matter in demand exceeded the sum of \$500, because the statute must be understood to require a sum in money value exceeding that, to be stated.)]

² *Pitkin vs. Flowers*, 2 *Root* (Conn.), 42. (In chancery, the alleged value of the land in the petition gives the rule for sustaining jurisdiction, although the evidence show it to be of less value. Petition granted.)

Lord Bacon's ordinance declaring that all suits in Chancery under the value of £10 shall be dismissed, is still in force in New Jersey (*Allen vs. Demarest*, 41 *N. J. Eq.*, ; s. c., 3 *Cent. Rep.*, 79), and was formerly in force in New York, having been increased to £100, but is now superseded in the latter State by the Code. *Quick vs. Keeler*, 2 *Sandf.* (N. Y.), 231; *Hammond vs. Hudson River Iron & Machine Co.*, 20 *Barb.* (N. Y.), 378.

³ *Exp. Bradstreet*, 7 *Pet. (U. S.)*, 634, 647. (Writ of right in District Court without allegation of the value of the premises. Motion to dismiss for want of jurisdiction granted; leave to amend by inserting allegation denied. The Supreme Court on mandamus refused to review the application for leave to amend because discretionary, but ordered the Court below to reinstate and try the cause under the existing pleadings. The Court say: "In cases where the demand is not for money and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this Court and of the Courts of the United States is to allow the value to be given in evidence. In pursuance of this practice, the demandant in the suits dismissed by order of the judge of the District Court had a right to give the value of the property demanded as evidence at or before the trial of the cause, and would have a right to give evidence in this Court. Consequently he cannot be legally prevented from bringing his case before this tribunal.")

s. p., *Crawford vs. Burnham*, 4 *Am. L. T. (U. S.)*, 228.

Den vs. Wright, *Pet. Cir. Ct. R.*, 64. (Ejectment. To this case the following statement was appended: "NOTE.—In the above cause defendants moved, in arrest of judgment, that the jury had not found that the value of the land exceeded \$500." WASHINGTON, J.: "It would be sufficient to fix the jurisdiction, if the value were now proved by witnesses or an affidavit; and as the evidence given of the value of the tract proved it to exceed very far the sum of \$500, the Court cannot grant a rule to show cause why the judgment should not be arrested. The value was stated in the declaration.")

So when the record is silent as to the value, it must, for the purpose of appeal or error, be shown to the Supreme Court by the plaintiff in error, or appellant; and for this purpose it is proper for the court below to allow affidavits and counter-affidavits to be filed. *Wilson vs. Blair*, 119 *U. S.*, 387. (Ejectment: value of land not stated in the record.)

[*Contra*, *United States vs. Pratt Coal Co.*, 18 *Fed. Rep.*, 708. (Bill to recover land. *Held*, demurrable for not stating value to be above \$500. The point seems to have been little considered.)]

⁴ *Sharon vs. Terry* (*C. C. N. D. Cal.*), 1 *L. R. A.*, 572, 36 *Fed. Rep.*, 337. (Suit to have a paper, claimed by defendant to be a marriage declaration between plaintiff and defendant, declared to be a forgery. *Held*,

that though there was in the pleadings no statement of value of plaintiff's property, yet as the affidavits, which were properly allowed to be filed during the argument, showed that, if the alleged marriage contract were genuine, defendant would be entitled to much more than \$500 from plaintiff's estate, demurrer to jurisdiction should be overruled.)

§ 378. *Minimum amount,—actions for money demand.*

—In an action for damages, whether in a State Court of general jurisdiction or a Federal Court, the sum claimed by the plaintiff determines the jurisdiction of Court,¹ unless it appears as a matter of law that, upon the facts stated as a cause of action, the plaintiff could not be entitled to recover the amount of damages claimed.²

¹ *Bank of Charlotte vs. Britton*, 66 *N. C.*, 365. (In an action on a note made in 1863 for \$200, the complaint is not demurrable for want of jurisdiction, because by statute the presumption is that the loan was in Confederate money and therefore the recovery would be less than \$200, such presumption not being conclusive.)

Kanouse vs. Martin, 15 *How. (U. S.)*, 198. (Until some further judicial proceedings have taken place, showing, upon the record that the sum demanded in the declaration is not the matter in dispute, that sum is the matter in dispute in an action for damages. It is error, therefore, for the State Court after the filing of the petition for removal to permit plaintiff to amend by reducing the amount claimed in order to deprive the Federal Court of jurisdiction.)

Gorden vs. Longest, 16 *Pet. (U. S.)*, 97. (Action under a Kentucky statute for the taking on board of a boat commanded by defendant the plaintiff's slave as a passenger. The damages were laid at \$1000 in the declaration, and this amount was named in the writ. *Held*, the State Court erred in denying defendant's petition for removal on the ground that the amount in controversy did not exceed the sum or value of \$500, as the damages laid in the writ and declaration were unquestionably the sum in controversy. The Court say: "The damages claimed by plaintiff in his *writ* gives jurisdiction to the Court whether it be an original suit in the Circuit Court of the United States or brought here by petition from a State Court.")

² *Froelich vs. Southern Ex. Co.*, 67 *N. C.*, 1. (Though the jurisdiction of the court is dependent, by statute, upon the sum *demand*ed, yet the plaintiff will not be allowed, by demanding an amount clearly above that which the facts alleged in his complaint entitle him to claim, to bring his case within the jurisdiction. The phrase "the sum demanded" should be understood as meaning the sum really in dispute, upon the facts.)

Smith vs. Greenhow, 109 *U. S.*, 669, 671. (Declaration in trespass for entering upon the premises of plaintiff and the taking and carrying away personal property of the value of \$100. The damages are laid at \$6000. *Held*, as it could not be assumed as a matter of law that the amount laid was not recoverable by including exemplary damages, an order remanding the cause, on the ground that the matter in dispute did not exceed the sum or value of \$500, could not be justified, where the Circuit Court had not found as a matter of fact that the amount stated in the declaration was colorable.)

s. p., *Barry vs. Edmunds*, 116 *U. S.*, 550. (Malicious trespass in the collection of taxes. No ground for dismissal that the declaration shows that the amount of taxes due and the value of the property levied upon was less than the jurisdictional limit, as the amount of damages claimed exceeded that limit.)

Martin vs. Taylor, 1 *Wash. (U. S.)*, 1. (Covenant upon an agreement under seal containing a penalty of less amount than the sum necessary to give *U. S.* Circuit Court jurisdiction. *Held*, as the action was not for the penalty upon the ground that it was in the nature of liquidated damages, but on covenant and for damages which the declaration stated to be more than \$500, the motion to arrest judgment for want of jurisdiction should be overruled.)

Interest as well as costs are excluded from the computation by the act of 1887.

Moore vs. Town of Edgefield (U. S. Cir. Ct., D. So. Car.), 32 *Fed. Rep.*, 498.

§ 379. *Combining several causes of action between same parties.*—Where the Court has no jurisdiction unless the sum amount to a specified limit, if several causes of action by the same plaintiff against the same defendant are joined in one action, it is sufficient if they amount in the aggregate to the sum requisite to give the Court

jurisdiction, although separately each may be below such amount.

Bailey vs. Sloan (Cal., 1884), 4 *Pacif. Rep.*, 349. (Holding that the *ad damnum* clause is the test.)

Green vs. Lester, 78 *Ga.*, 86.

Vineyard vs. Lynch (Mo., 1885), 1 *Western Rep.*, 769. (Under a statute providing that in actions *ex delicto* damages claimed in the petition shall determine the jurisdiction of the Court, the test of jurisdiction in such cases is the aggregate amount of damages prayed for, and not the amount of damages prayed for in a single count.)

Ridgway vs. Pancost, 1 *Cranch C. Ct.*, 88.

[*Contra*, *Berry vs. Linton*, 1 *Ark.*, 252.]

The same rule applies in United States Circuit Courts, although some of the causes which have been united were assigned to the plaintiff, and the assignor could not have maintained an action on such causes separately on account of their being less than the jurisdictional limit. The provisions of the Federal Judiciary Act measuring the right of an assignee to maintain a suit, by that of his assignor relates only to causes where the jurisdiction depends on citizenship.

Bernheim vs. Birnbaum, 30 *Fed. Rep.*, 885 (*U. S. Cir. Ct. S. D. Ga., E. D.*). (Under the act of March 3d, 1887.)

Hammond vs. Cleaveland, 23 *Fed. Rep.*, 1 (*U. S. Cir. Ct. D. Oreg.*). (The action was brought on three distinct causes of action, arising out of contract which by section 91 of the Oregon Code of Civil Procedure may be united in one complaint, for the aggregate sums of which the plaintiff asked judgment. *Held*, the portion of the complaint setting out an assigned cause of action for less than \$500 was not demurrable for the want of jurisdiction, although the assignor could not have maintained the action because of the insufficiency of amount. *So held* under Federal Judiciary Act of 1875.)

§ 380. *Combining joint or several interests of different claimants.*—If the object of the suit is to recover a single and entire fund, although it be by an officer or trustee for the benefit of several beneficiaries, an allegation that the fund exceeds the statutory requirement is sufficient.¹

But if the suit is by one or more of several parties in

interest, to have an accounting and distribution as to a fund in which their interests are so far separate that either one, might proceed, although the others should settle, an allegation that the fund exceeds the statutory requirement is not sufficient, but the allegation must relate to the interests of each.²

¹ *Prince vs. Towns*, 33 *Fed. Rep.*, 161. (While it is true that parties who have several and distinct interests cannot unite them for the purpose of creating jurisdiction, yet when the representatives of a deceased intestate bring suit against an administrator under the same title and for a common and undivided interest, the Court will have jurisdiction, although the amount on division which would come to each representative may be less than the jurisdictional minimum.)

Davies vs. Corbin, 112 *U. S.*, 36. (Mandamus at the relation of several judgment creditors to compel the levy of taxes, by the proper county officer, to raise the fund necessary to satisfy such judgments. *Held*, that in such case the officer is to collect a tax, not for the benefit of any one creditor alone, but for all. Hence "a payment of the judgment of one creditor would not relieve him from his obligation to collect the whole tax. The object of the proceeding is, not to raise the sums due the relators, but to raise the whole tax.")

² *Rich vs. Bray* (*W. D. Mo.*, 1889), 17 *Wash. Law Rep.*, 410. (Bill by heirs to compel accounting as to the estate alleged its value to be much more than \$2000 above all just debts. On demurrer PHILIPS, J., says: "I understand the rule in such case to be that where two or more parties may thus join, as a matter of convenience to prevent multiplicity of suits, in one action for the ascertainment and distribution of their respective interests in a common fund, the interest of each, independently of the others, must amount to the sum of \$2,000 to give jurisdiction to this Court. *King vs. Wilson*, 1 *Dill.*, 556, 568; *Massa vs. Cutting*, 30 *Fed. Rep.*, 1; *Woodman vs. Latimer*, 2 *Fed. Rep.*, 842; *Seaver vs. Bigelow*, 5 *Wall.*, 208, 210; *Terry vs. Hatch*, 93 *U. S.*, 44; *Chatfield vs. Boyle*, 105 *U. S.*, 231, 234." Demurrer sustained [citing *Maxwell vs. Kennedy*, 8 *How. (U. S.)*, 210].)

s. *p.*, *Schulenburg-Boeckeler L. Co. vs. Hayward* (*U. S. C. C. W. D. Wisc.*, March, 1884), 20 *Fed. Rep.*, 422.

§ 381. *Form of allegation.*—An allegation which shows with reasonable certainty that the requisite sum is involved is sufficient.

Judd *vs.* Bushnell, 7 *Conn.*, 204.

Bradt *vs.* Kirkpatrick, 7 *Paige* (N. Y.), 62.

Olney *vs.* The Falcon, 17 *How.* (U. S.), 19. (Claim stated at a sum near the jurisdictional sum "and upwards," not enough.)

§ 382. *Maximum amount as a limit.*—If the plaintiff's pleading is so expressed that he could not recover upon it an amount which exceeds the limit of the jurisdiction of the Court, it is not demurrable for want of jurisdiction merely because he might have so pleaded on the same cause of action to recover more;¹ as, for instance, where the instrument on which he sues entitles him to more,² or where he states several causes which in the aggregate exceed the jurisdictional amount,³ but he limits his damages or demand for relief to a sum within the jurisdiction, or where he waives interest which would have made his claim exceed the jurisdictional limit.⁴

¹ Wightman *vs.* Carlisle, 14 *Vt.*, 296. (Holding the Justice of the Peace had jurisdiction of an action although the plaintiff might have claimed more than \$100 if his allegations were true.)

McVey *vs.* Johnson, 75 *Iowa*, 165. (Where a petition in Justice's Court claimed that there was due plaintiff from defendant \$124.83, but demanded judgment for \$99 only, the latter sum was the amount in controversy, and hence the Court had jurisdiction.)

² Litchfield *vs.* Daniels, 1 *Col. T.*, 268. (Under § 25 *Colo. Rev. Code*, giving the Probate Court jurisdiction "where the debt or sum claimed shall not exceed \$2000," an action may be maintained in such Court on a note for a greater sum, if the plaintiff limits his claim in the *ad damnum* to \$2000.)

[*Contra*, Cox *vs.* Stanton, 58 *Ga.*, 406. (Holding that where it appears that the plaintiff has reduced the amount of a note by indorsement without the consent of defendant in order to bring an action in the Justice's Court, the judgment of such Court will be set aside for

the want of jurisdiction. A note being an entire contract, it requires the consent of both parties to alter and reduce its amount.)]

^a *Culley vs. Laybrook*, 8 *Ind.*, 285.

Hoey vs. Hoey, 36 *Conn.*, 386. (Although a bill of particulars be filed in the case setting forth an indebtedness which exceeds the jurisdictional limit of the Court, it is the duty of the Court so to apply each item therein to the count to which it was applicable as, if possible, to retain rather than defeat its jurisdiction.)

^a *Wright vs. Smith*, 76 *Ill.*, 216. (Where the declaration in a suit in the County Court only claims \$500, the Court will have jurisdiction notwithstanding the evidence shows that the interest justly due when added to the principal exceeds that sum. The plaintiff in such a case has a clear right to waive any claim for the interest which will make the debt exceed the jurisdiction of the Court.)

[The expression "debt or damages demanded," in certain jurisdictional statutes in Massachusetts, refers to the *ad damnum* in the writ, without regard to the amount claimed in the declaration, or proved. *Clay vs. Barlow*, 123 *Mass.*, 378; *Hapgood vs. Doherty*, 74 *Mass.*, 373.]

5. CITIZENSHIP CASES IN FEDERAL COURTS.

§ 383. *Demurrer lies*.—It is the better opinion that the objection that it appears on the face of plaintiff's pleading that the requisite citizenship to give the Federal Court jurisdiction does not exist, may be taken by demurrer.¹ And the same rule is applied where the pleading in a cause commenced in the Federal Court merely fails to show the requisite citizenship.² It is otherwise where the cause was commenced in a State Court, and removed to the Federal Court on a petition supplying the necessary allegation; for in such case the Federal Court acquires jurisdiction without the aid of the allegation in the pleading.³

It is otherwise also of an ancillary bill relating to a suit of which the Court had jurisdiction.⁴

¹ *Susquehanna, etc., Coal Co. vs. Blatchford*, 11 *Wall.*, 172. (*Dictum*, the point ruled being that the objection need

not be pleaded in abatement, but might be reached on demurrer or without demurrer at any stage.)

[*Contra*, *Tyler vs. Hand*, 7 *How. U. S.*, 573, 584—a considered ruling, founded however on the technical rule of the English Chancery practice that a demurrer in abatement, though not to be rejected, entitled plaintiff to judgment, because matter in abatement must be set up by plea.]

² *Ketchum vs. Driggs*, 6 *McLean*, 13. (Demurrer to bill in equity sustained because requisite citizenship was not affirmatively shown.)

Speigle vs. Meredith, 4 *Biss.*, 120.

s. p., *Continental Ins. Co. vs. Rhoads*, 119 *U. S.*, 237; *s. c.*, 30 *Law ed.*, 380; 7 *Supm. Ct. Rep.*, 193.

Rike vs. Floyd (S. D. Ohio), 42 *Fed. Rep.*, 247. (Petition bad on demurrer for not affirmatively showing citizenship.)

Otherwise where the lack of citizenship is on the part only of a co-plaintiff, if the want of jurisdiction relates only to him, and not to the whole bill; and the demurrer should be overruled; and the bill should be dismissed as to him at the hearing. *Nebraska City Nat. Bank vs. Nebraska City Hydraulic Gas-light, etc., Co.*, 14 *Fed. Repr.*, 763.

³ *Briges vs. Sperry*, 95 *U. S.* (5 *Otto*), 401.

⁴ *Krippendorf vs. Hyde*, 110 *U. S.*, 276. (Decree sustaining demurrer reversed.)

Johnson vs. Christian, 125 *id.*, 642.

§ 384. *Direct allegation.*—Citizenship is regarded as a matter of fact, and not a mere conclusion,¹ unless details are stated which do not bear it out; in which case, the details may be regarded as the allegation of fact, and the allegation of citizenship disregarded as a mere conclusion.²

An allegation that the party is a citizen of a specified State is enough, for the Court will take judicial notice that it is one of the United States.³

¹ *State vs. Harris*, 3 *Ark.*, 570; *s. c.*, 36 *Am. Dec.*, 460. (So held on demurrer in quo warranto.)

² *Grace vs. Am. Central Ins. Co.*, 109 *U. S.*, 278. (Here a petition for removal, after stating only the "residence" of the parties, alleged "that there is and was at the time when this action was brought a controversy

therein between citizens of different States." *Held*, that such allegation must be deemed an unauthorized conclusion of law.)

^a *Wright vs. Hollingsworth*, 1 *Pet. (U. S.)*, 165; 7 *Law ed.*, 96.

So an allegation that he is a citizen of the southern district of Alabama is equivalent to saying that he is a citizen of the State of Alabama. *Berlin vs. Jones*, 1 *Woods*, 638.

§ 385. — *as to corporation*.—To give jurisdiction on the ground of diverse citizenship, it is not enough that the pleadings aver that a corporation is a "citizen" of a specified State, but it must appear that it was created by or under the laws of such a State.

Muller vs. Dows, 94 *U. S.*, 444, 445. (Appeal from decree of Cir. Ct., Dist. Iowa. Not stated by *what form* of proceedings or pleading the case was brought before the Supreme Court. The first "objection" was to the jurisdiction. (There were also others.)—This had not been raised in the Circuit Court. Decree affirmed.)

Insurance Co. vs. Francis, 11 *Wall. (U. S.)*, 210. (An averment that the defendant is a corporation created by the act of the legislature of the State of New York, located in Aberdeen, Mississippi, and doing business under the laws of the State, is not an averment that the defendant is a citizen of Mississippi.)

§ 386. *Form of allegation*.—An allegation of residence cannot avail as equivalent to an allegation of citizenship for the purpose of giving jurisdiction.¹ Neither can an allegation of domicile;² nor is it enough to say that a party is "of" a specified State.³

¹ *Menard vs. Goggan*, 121 *U. S.*, 253; s. c., 30 *Law ed.*, 914; 7 *Supm. Ct. Repr.*, 873 (at law).

Everhart vs. Huntsville College, 120 *U. S.*, 223; s. c., 30 *Law ed.*, 623; 7 *Supm. Ct. Repr.*, 555 (in equity).

In citizenship, residence and intent must concur; a man may reside awhile within a State without becoming a citizen. *Sharon vs. Hill*, 26 *Fed. Rep.*, 337; *State Savings Asso. vs. Howard*, 31 *id.*, 433.

For other authorities see TRIAL EVIDENCE, 102, etc.

- ² *Brown vs. Keene*, 8 *Pet. (U. S.)*, 112; s. c., 8 *Law ed.*, 885. *Contra*, *Express Co. vs. Kountze Bros.*, 8 *Wall. (U. S.)*, 342, 351. (Holding that an allegation showing that plaintiffs were "an association not incorporated, formed for the purpose of carrying on the banking business at Omaha, Neb., and were at the time the cause of action arose, and still were, engaged in business at said Omaha,"—that period covering 18 months,—is equivalent to saying they had their domicile there, and implies citizenship sufficiently to show jurisdiction. So held where the objection was not taken in the Court below.)

[*Compare* *Godfrey vs. Terry*, 97 *U. S.*, 171. (Holding that where the record shows that the complainant is a citizen of one State and the respondents are stockholders of a bank in another State, their citizenship not appearing, and the bank not being a party to the suit,—the citizenship of the parties is not sufficiently shown.)]

- ³ *Grace vs. American Central Ins. Co.*, 109 *U. S.*, 278.

§ 387. *Description in title or in introduction.*—Describing a party as a citizen of a State, in the title of the cause at the head of the pleading, is not a sufficient allegation of his citizenship, for the title is not part of the bill.¹

But describing him as such in the introductory clause of a bill after the address to the judges, according to the usual form of a bill in equity,² or in the prayer for process in the end of the bill,³ is sufficient.

- ¹ *Jackson vs. Ashton*, 8 *Pet. (U. S.)*, 148; 11 *Curt. C. Ct.*, 53.

- ² *Sharon vs. Hill*, 23 *Fed. Rep.*, 353.

- ³ *Jones vs. Andrews*, 10 *Wall. (U. S.)*, 327.

So where the writ stated citizenship sufficiently, *held* that plaintiff might declare without averring citizenship; and unless the defendant pleaded the variance between the writ and the declaration, in abatement, he could not afterwards take advantage of it in arrest of judgment, nor assign it for error. *Smith vs. Clapp*, 15 *Pet. (U. S.)*, 125.

§ 388. *Time of citizenship.*—The weight of authority is that where an allegation of citizenship contained in the

pleadings is relied on as giving original jurisdiction to the Federal Court (as distinguished from the allegation in pleading or petition necessary to effect removal from a State Court), it is not essential that the allegation expressly refer to the time when the action was commenced, as distinguished from the time of pleading.¹

Otherwise of the denial of citizenship in a plea in abatement.²

¹ *Thompson vs. Cook*, 2 *McLean* (U. S.), 122. (The declaration stated the plaintiff to be a citizen of the State of New York. It was objected on demurrer that this was not an averment that he was a citizen at the time the suit was commenced, as it did not follow, from his being a citizen at the time the declaration was filed, that he was a citizen at the time the writ was issued. *Held*, sufficient. Demurrer overruled.)

Birdsall vs. Perego, 5 *Blatchf.* (U. S.), 251. (An amended declaration in a United States Court is good, although stating the citizenship of the parties in the present tense instead of as existing at the time of the commencement of the suit.)

[This conclusion necessarily follows also from the rule recognized in some of the cases that a mere description, without formal allegation, is enough.]

In *Bailey vs. Dozier*, 6 *How.* (U. S.), 23; s. c., 12 *Law ed.*, 328, it was held that describing the parties, in the commencement of a declaration, as citizens of the same State, is not fatal to jurisdiction, where there is an allegation in the body of the declaration that an assignor of the cause of action was, at the time of assigning, a citizen of another specified State.

§ 389. *Suit by assignee.*—When the jurisdiction of a suit by an assignee partly depends under the statute on the citizenship of the assignor, the plaintiff's pleading is demurrable if it does not state the citizenship of the assignor.

Rogers vs. Linn, 2 *McLean* (U. S.), 126.

Raisin Fertilizer Co. vs. Snell, 21 *Fed. Rep.*, 353. (Holding that plaintiff cannot, by waiving rights which bring the case within the statute, maintain the action without such allegation.)

s. P., *Morgan vs. Gay*, 19 *Wall. (U. S.)*, 81.

In *Thompson vs. Cook*, 2 *McLean (U. S.)*, 122, it was held that an allegation that John W. Taylor & Co. are citizens of the State of New York is a sufficient allegation of the citizenship of the assignors of a promissory note, and that it was not necessary to set forth in the declaration the individuals who compose the firm. Demurrer overruled.

§ 390. *Citizenship in Federal Court, not a personal privilege.*—The lack of such citizenship as is necessary to give jurisdiction in a Federal Court, is an objection which goes not to the person but to the subject-matter; and a party who invoked the jurisdiction by procuring removal is not precluded from raising it.

Mansfield, etc., R. Co. vs. Swan, 111 *U. S.*, 379. (The cause was removed on petition of defendant. Plaintiff moved to remand. The motion was denied, and on the trial the plaintiff recovered judgment. On appeal, judgment reversed because the motion to remand should have been granted, as the petition failed to show the proper citizenship in order to confer jurisdiction. The Court say: "It is true that the plaintiffs below against whose objection the error was committed do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this Court on its own motion to deny its own jurisdiction.")

Where it appears by the petition for removal that the parties to the action were citizens of the same State at the time of the commencement of the action, the cause should be remanded. The difference of citizenship must exist at the time the suit was begun as well as the time of removal.

The jurisdiction of the Circuit Court fails unless the necessary citizenship affirmatively appears in the pleadings or otherwise in the record.

But in *Hinckley vs. Byrne*, *Deadly (U. S.)*, 224, it was held that in an action sounding in tort a plea in abatement by one defendant to the effect that the Court has

not jurisdiction of his co-defendant is bad on demurrer; the liability being several, only the defendant exempt from the jurisdiction can object.

Compare also *Bushnell vs. Kennedy*, 9 *Wall.*; 387; 19 *Law ed.*, 736. The restriction in the 11th section of the Judiciary Act of 1789 that no District or Circuit Court shall take cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless the suit might have been prosecuted in such court if no assignment had been made, is a privilege of the defendant and may be waived, and has no application to the 12th section of the act permitting the defendant to petition for removal if the suit is by a citizen of the State in which the suit is brought against a citizen of another State. Where, therefore, the cause has been removed by the defendant, he cannot afterwards object to the jurisdiction of the Court because the case is within the restriction of the 11th section. Order remanding cause reversed.

§ 391. *Ranging parties to affect jurisdiction.*—On demurrer to the jurisdiction founded on a question as to the different citizenship of adverse parties, the Court will look at the actual interests of the parties as disclosed by the pleadings; and if no good reason appears why a co-plaintiff having the interest of a defendant was not made a defendant instead of a co-plaintiff or *vice versa*, the Court will presume that the mode of joinder was adopted to evade the rule as to jurisdiction, and will sustain the objection if it would have been sustained had the parties been ranged according to their interest in the controversy.

Rich vs. Bray (*W. D. Mo.*, 1889), 17 *Wash. Law. Rep.*, 410, 413. PHILIPS, J., says: "This question has undergone thorough examination in the case of *Bland vs. Fleeman*, 29 *Fed. Rep.*, 669, in a case quite parallel in principle; and approving the principle therein announced as applied to the facts of this case, I hold that jurisdiction cannot thus be thrust upon this Court."

6. AS AFFECTED BY DEFENDANT'S RESIDENCE.

[There are two classes of statutes affecting jurisdiction by the residence or place of service of defendant: (1) those where it is only a question of personal privilege, as in U. S. Circuit Court cases where jurisdiction is given by a Federal question; and (2) those where jurisdiction of the subject-matter is given to a court only on condition of residence within the limits. In the former case the defendant affected may waive the objection. In the other case any defendant may object.]

§ 392. *Defendant sued out of his district.*—Where the statute against suing a defendant out of the district of his residence, in effect gives only a personal privilege,—as in Federal-question cases in the United States Court,—a defendant so sued may demur, if the fact that he is so sued affirmatively appears by the plaintiff's pleading.¹

Otherwise not.²

But if he waives the objection, no other defendant can raise it.³

¹ *Miller-Magee Co. vs. Carpenter (C. C. S. D. Ohio)*, 34 *Fed. Rep.*, 433. (Bill for infringement of patent; demurrer sustained.)

Reinstadler vs. Reeves, 33 *Fed. Rep.*, 308. (Same effect; but THAYER, J., doubted whether demurrer was the proper remedy rather than motion.)

[For the rule where the statute conditions jurisdiction of the subject-matter on the question of residence or place of service, see p. 301, above, and 112 *N. Y.*, 315.]

² *Gracie vs. Palmer*, 8 *Wheat.*, 699; s. c., 5 *Law. ed.*, 719.

³ *Pond vs. Vermont Valley R. Co.*, 12 *Blatchf.*, 282.

§ 393. *Defendant's inhabitancy.*—In the Courts of the United States it is not necessary that it should affirmatively appear that defendant was an inhabitant of the district in which the suit is brought.

Gracie vs. Palmer, 8 *Wheat.*, 699, 5 *Law ed.*, 719. (Motion to dismiss writ of error denied.)

§ 394. *Foreign corporation*.—Whether, under the statute allowing an action against a foreign corporation only in specified cases, goes to the jurisdiction of the subject-matter, or creates only a personal privilege which may be waived, depends on the frame of the statute.

Note in 18 *Abb. N. C.*, 435, on Jurisdiction of Foreign Corporations.

Friezen vs. Allemania Fire Ins. Co., 30 *Fed. Rep.*, 349.

Cent. R. & Bkg. Co. vs. Georgia Constr. & Invest. Co. (*So. Car.*, 1890), *Rw. & Corp. L. J.* (May 31, 1890), 422.

Cofrode vs. Gartner (*Mich.*, 1890), 7 *L. R. A.*, 511.

Robinson vs. Oceanic Steam Nav. Co., 112 *N. Y.*, 315.

Handy vs. Ins. Co., 37 *Ohio St.*, 371.

New Orleans, J. & G. N. R. Co. vs. Wallace, 50 *Miss.*, 244.

First National Bank of Charlotte vs. Morgan, 132 *U. S.*, 141. (Holding, in reference to the now obsolete exemption of National Banks from suits in State Courts in counties other than the county in which the bank is located, that the objection that a corporation is not liable to be sued in a particular court or district, but only in that of its election, is waived by appearing and going to trial without raising it. Judgment affirmed.)

§ 395. *No waiver by qualified appearance*.—A demurrer on the ground that the Court has no jurisdiction of the person is not waived by the appearance of the defendant, if the appearance be qualified as being for that purpose alone.

Ogdensburgh, etc., R. R. Co. vs. Vermont, etc., R. R. Co., 16 *Abb. Pr., N. S. (N. Y.)*, 249; *aff'd* in 4 *Hun*, 712.

IX. DEMURRER FOR WANT OF CAPACITY.

§ 396. Objection must be apparent.

397. Capacity of natural person presumed.

398. Use of name of committee, guardian, etc.

399. Allegation of capacity not conclusive.

400. Allegation of individual cause

of action by plaintiff described as representative.

§ 401. Defect of plaintiff's allegation of appointment.

402. Omission to designate in caption.

403. Subsequent reference to capacity.

§ 396. *Objection must be apparent.*—To sustain a demurrer for want of legal capacity to sue, the want of capacity must appear affirmatively on the face of the complaint.

Phoenix Bank vs. Donnell, 40 *N. Y.*, 410, aff'g 41 *Barb.*, 571. (Holding that suing in a corporate name and omitting to allege incorporation is not a case for demurrer.)

s. p., *Seymour vs. Thomas Harrow Co.* (*Ala.*, 1887), 1 *South. Rep.*, 45.

Minneapolis Harvester Works vs. Libby, 24 *Minn.*, 327. See *Dale vs. Thomas*, 67 *Ind.*, 570; *Am. Button Hole Co. vs. Moore*, 2 *Dak.*, 280.

Compare *Tipton County vs. Kimberlin*, 108 *Ind.*, 449; 6 *West. Rep.*, 885.

[An exception to the rule in case of corporations is introduced by *N. Y. Code Civ. Pro.*, § 1775, requiring the complaint to allege incorporation, etc.; and there is a similar statute in several other States.]

[Compare *D'Auxy vs. Porter* (*U. S. C. Ct. Conn.*), 41 *Fed. Rep.*, 68. (Objection that complaint shows plaintiff is a foreign executor, etc., and does not show letters taken out within the State, fatal on demurrer.) To same effect, *Black vs. Allen* (*S. D. N. Y.*), 42 *id.*, 618.]

The fact that the complaint does not show that a foreign corporation plaintiff has complied with the statutory conditions as to agent, and doing business, is not available on demurrer. *Utley vs. Gardner Mining Co.*, 4 *Col.*, 369; *Fritts vs. Palmer*, 132 *U. S.*, 282, 290; *Haley Livestock Co. vs. Routt County* (*C. Ct. D. Col.*), 2 *Denver Leg. N.*, 84. But compare §§ 146, 147, *AUDIT*; § 287, 288, *LEAVE TO SUE*; and §§ 344, etc., *STATUTES*; and *Am. Button Hole, etc., Co. vs. Moore*, 2 *Dak.*, 280.

The particular defect of capacity must be pointed out by the demurrer. *N. Y. Code Civ. Pro.*, § 490. Where there are several plaintiffs, a demurrer as to the capacity of "the plaintiffs" is not sustainable if any one of them has capacity. *O'Callaghan vs. Bode*, 84 *Cal.*, 489; *s. c.*, 24 *Pacif. Rep.*, 269.

Where there are several causes of action, an introductory statement of capacity, not confined to any one cause of action, serves alike for all. *West vs. Eureka Mfr. Co.*, 40 *Minn.*, 394; *s. c.*, 42 *North West. Rep.*, 87. Compare *Loup vs. California Southern R. Co.*, 63 *Cal.*, 97

[approved in *People vs. Central Pacif. R. Co.*, 83 *id.*, 393; s. c., 23 *Pacif. Rep.*, 303], where it appears to have been held that a statement in one count will not avail to sustain other counts; with *dictum* that it must be in every count. See § 22.

§ 397. *Capacity of natural person presumed.*—Capacity to contract and to sue is presumed in respect to a person suing or sued in an individual name, where there is nothing to indicate incapacity.

Prince vs. Towns, 33 *Fed. Rep.*, 161. (Objection that children should have sued by prochein amy disregarded because there was nothing in the record or the evidence to show that they were minors.)

s. p., *Gould's Pl.*, 155. (Not necessary to allege majority of a party to suit or contract.)

Funk vs. Davis (*Ind.*, 1885), 2 *North East Rep.*, 739, 742. (Holding this on demurrer, even though the caption stated that some of the plaintiffs were adults, and others infants suing by their next friend. The Court say: "This was not a sufficient averment of minority. The complaint was, however, not for that reason bad on demurrer." [*Lancaster vs. Gould*, 46 *Ind.*, 397; *Maxedon vs. State*, 24 *Ind.*, 370.]

§ 398. *Use of name of guardian, committee, etc.*—The objection that a suit brought by a person not *sui juris* should, under the law applicable, be brought in the name of a guardian, committee, or next friend, instead of in his own name,¹ or conversely in the name of the infant, etc., instead of in that of his guardian,² is an objection for the want of legal capacity to sue.

¹ *Spooner vs. Delaware, L. & W. R. Co.*, 115 *N. Y.*, 22, 30. (*Guardian ad litem.*)

Perkins vs. Stimmel, 114 *id.*, 359. (General guardian.)

West vs. West (*Ala.*, 1890), 7 *South. Rep.*, 830. (Bill by guardian of lunatic.)

s. p., *Jemison vs. Kennedy*, 55 *Hun* (*N. Y.*), 47. (Suit by Indian, in his own name.)

Compare Clowers vs. Wabash, etc., R. Co., 21 *Mo. App.*, 213, and *cas. cit.*

² For the mode of pleading in such case see *Gorham vs. Gorham*, 3 *Barb. Ch. (N. Y.)*, 24, and the statutes of the jurisdiction affecting the power of the guardian or committee, and ward.

§ 399. *Allegation of capacity not conclusive.*—The word “as” inserted between the name of the plaintiff and the description of his representative capacity in the introductory clause of the complaint is a sufficient allegation that he sues in that capacity, if allegations show that he has that capacity, and that the cause of action is vested in him in that capacity.

Plaut vs. Plaut, 44 *N. J. Eq.*, 18; 13 *Atl. Rep.*, 849; 12 *Cent.* 239. (Unnecessary that an executor party plaintiff should be styled “executor” in the commencement or conclusion of a bill, there being allegations showing his capacity.)

Bennett vs. Whitney, 94 *N. Y.*, 302.

Berolzheimer vs. Strauss, 51 *N. Y. Super. Ct. (J. & S.)*, 96. (Surviving partner.)

Buyce vs. Buyce, 48 *Hun*, 433. (Public officer.)

Nicholas, assignee, vs. Murray, 5 *Sawy.*, 320. (Bill by assignee in bankruptcy. The objection that a plaintiff suing in a representative capacity, and describing himself as such, does not allege his appointment, cannot avail on demurrer: the objection must be taken by plea.)

By statute in Iowa, where one or more sue or are sued in a corporate, or partnership, or representative capacity, the facts constituting it need not be set forth, but it is enough to allege generally the capacity or relation as a legal conclusion. *McClain's Anno. Code*, § 2716.

§ 400. *Allegation of individual cause of action by plaintiff described as representative.*—A complaint, stating a cause of action on which plaintiff appears to be entitled to recover in his individual capacity, is not demurrable because the action is entitled as brought by him as executor, or as administrator,¹ or otherwise as a representative; even if, by reason of the appointment being foreign, the action could not be sustained in the

representative capacity.² The description may be rejected as surplusage.

¹ *Litchfield vs. Flint*, 104 *N. Y.*, 543, 550; *s. c.*, 7 *Cent. Rep.*, 41; 11 *North East.*, 58.

Bennett vs. Whitney, 94 *N. Y.*, 302.

Merritt vs. Seaman, 6 *N. Y.*, 168, rev'g 6 *Barb.*, 330.

[See also *Bingham vs. Marine Natl. Bank*, 17 *Abb. N. C.*, 431, and note (abstract *s. c.*, in 41 *Hun.*, 377); *Thompson vs. Whitmarsh*, 100 *N. Y.*, 35, 39, explaining *N. Y. Code Civ. Pro.*, § 1814; *Stillwell vs. Carpenter*, 2 *Abb. N. C.*, and compare 1 *Am. St. Rep.*, 191.]

As to suing or being sued individually and in representative character, see *Day vs. Stone*, 15 *Abb. Pr. N. S.*, 137; *s. c.*, 5 *Daly*, 353.

² *Newberry vs. Robinson* (*S. D. N. Y.*), 36 *Fed. Rep.*, 841. [*Compare Mills vs. Knapp*, 39 *id.*, 592.]

§ 401. *Defect of plaintiff's allegation of appointment.*—If plaintiff's cause of action is such that he can only sue in a representative capacity,¹ the objection that his complaint shows that he was not duly appointed is available under a demurrer for want of legal capacity.²

¹ If he sues unnecessarily in representative capacity, when the action lies individually, defect of unnecessary allegation of appointment is not available on demurrer.

² *Secor vs. Pendleton*, 47 *Hun* (*N. Y.*), 281. (Insufficiency of allegation that plaintiff was appointed administrator, not available under demurrer for insufficiency, for it should be raised by demurrer for incapacity.)

[So far as this case holds that neglect to show capacity is demurrable, it overlooks the rule that the want of capacity must affirmatively appear on the face of the complaint. See § 396.]

§ 402. *Omission to designate in caption.*—A complaint sufficiently alleging the representative capacity of either the plaintiff or the defendant, is not bad on demurrer because of not designating him as representative in the title

Plant vs. Plaut (*N. J.*, 1888), 12 *Cent. Rep.*, 239. (*Held*,

also, not bad for not designating him as such in the prayer for process.)

s. p., *Brashear vs. Van Cortlandt*, 2 *Johns. Ch. (N. Y.)*, 247. (Holding objection to omission of representative capacity from subpoena to answer bill, and from appearance, too late after final decree.)

And see *Hill vs. Thacter*, 2 *Code R.*, 3; s. c., 3 *How. Pr.*, 407.

§ 403. *Subsequent reference to capacity.*—If the representative character or other special capacity of the party has once been shown in the pleading, a reference to him in all subsequent parts of it as “the plaintiff,” or “the defendant,” without adding his special character, is sufficient.

Stanley vs. Chappell, 8 *Cow. (N. Y.)*, 235.

1 *Chitt. Pl.*, 16 *Am. ed.*, 373, citing *Cobbett vs. Cochrane*, 8 *Bing.*, 17. (Action by assignees suing as such. Allegation that defendant did not pay plaintiff, sufficient even on special demurrer without adding “as such assignees.”)

Buyce vs. Buyce, 48 *Hun (N. Y.)*, 433.

X. DEMURRER FOR MISJOINDER.

[Under the Codes it is usually necessary to discriminate closely between misjoinder of parties and misjoinder of causes of action. That which is termed in Equity misjoinder of parties (there being in equity, in theory, but one cause of action in a bill) is under the codes objected to as a misjoinder of causes of action, if the real objection be that rights not necessarily connected are asserted against separate defendants, who should be sued in separate actions.]

1. GENERAL RULES.

§ 404. State practice in U. S. Court. § 405. Specifying defect.

2. MISJOINDER OF CAUSES OF ACTION.

A. *Form of the Demurrer.*

§ 406. Goes to the whole pleading.

§ 407. Joint or separate.

B. *Objections for Misjoinder of Causes of Action as affected by the question, What is a Single Cause of Action?* [See also subd. D, below.]

§ 408. Separate statement of elements of a single cause of action.

§ 412. — incidental demands.

409. Commingled statement.

413. Inconsistent relief.

410. Several grounds for a single recovery.

414. Aggravation, though such as might be a cause of action by itself

411. Several demands for relief on same facts.

C. *Objection to Misjoinder of Causes of Action turning on the Nature of the Claims.*

§ 415. Contract and tort.

§ 422. Legal and equitable causes.

416. Electing between contract and tort.

423. Action to recover debt and enforce lien.

417. Warranty, and false representations.

424. Incidental relief.

418. Express and implied contract.

425. Same transaction or subject.

419. Covenant and trespass.

426. Place and mode of trial.

420. Injuries to person and property.

427. Inconsistency.

421. Common-law liability and penalty, or statutory liability.

428. Objection to jurisdiction only.

429. Avoiding demurrer by reason of insufficiency of one cause.

D. *Objections to Misjoinder of Causes of Action turning on the involving of Claims affecting Different Parties (including multifariousness).* [See also subd. B, above.]

§ 430. Several parties, at common law.

§ 434. Co-defendants under the New Procedure.

431. Under New Procedure.

432. Equitable action—co-plaintiff.

435. Different capacities.

433. Co-defendants in equity—multifariousness.

436. Allegation of two capacities and cause of action in one.

3. MISJOINDER OF PARTIES.

§ 437. Misjoinder of parties.

§ 440. Separate relief.

438. Presence of improper party.

441. Persons severally liable on the same instrument.

439. Co-plaintiffs not jointly interested.

1. GENERAL RULES.

§ 404. *State practice in U. S. Court.*—State practice allowing joinder of *parties* not joinable at common law, is applicable in the United States Circuit and District Court in the same State, in civil causes other than in equity, admiralty or in rem for a forfeiture.¹

It is a misjoinder to unite a legal with an equitable *cause of action* in an action brought in a court of the United States, though sitting in a State where it is not a misjoinder in the State Courts.²

¹ Fullerton vs. Bank of U. S., 1 *Pet.*, 604.

United States vs. Lawrence, 14 *Blatchf. (U. S.)*, 229.

² Hurt vs. Hollingsworth, 100 *U. S.*, 100.

Perkins vs. Hendryx, 23 *Fed. Rep.*, 418. (Holding the rule the same though the cause was removed from the State Court where the joinder was proper.)

§ 405. *Specifying objection.*—Under the New Procedure, a demurrer for misjoinder whether of causes of action,¹ or of plaintiffs² where that is allowable, must specify what the particular claims or who the parties are that have been improperly joined.³

¹ McCrea vs. N. Y. Elevated R. Co., 13 *Daly*, 302; s. c., 23 *Weekly Dig.*, 334; *N. Y. Code Civ. Pro.*, § 490.

[*Contra* of multifariousness in Equity, Pope vs. Leonard, 115 *Mass.*, 288; and see 1 *Dan. Ch. Pr.* (3d ed.), 584.]

² *Id.*; *Id.*; O'Callaghan vs. Bode, 84 *Cal.*, 489; s. c., 24 *Pacif. Rep.*, 269.

³ Anderton vs. Wolf, 41 *Hun (N. Y.)*, 571. (Holding it not enough to say that there are several causes "which do not affect the defendant;" nor to say that "several causes of action united appear on the face thereof not to belong to any one of the subdivisions of" the statute; nor to say in the language of the statute that several claims not arising out of the same transaction, etc., are united.)

In the following States the remedy for misjoinder is by motion, not demurrer: *Iowa*, *Code Civ. Prac.*, c. 7, *Rev. Code*, § 2630-3 (motion to compel election). *Ky.*, *Code Civ. Pro.*, §§ 83, 85, 86, 92 (objection waived if not taken by motion).

2. MISJOINDER OF CAUSES OF ACTION.

A. *Form of the Demurrer.*

§ 406. *Goes to the whole pleading.*—A demurrer for misjoinder of causes of action must be to the whole pleading, not merely to the cause of action objected to.

Ferris vs. North Am. Fire Ins. Co., 1 *Hill* (N. Y.), 71, (at common law, citing 1 *Chitt. on Pl.*, 180).

In *Cohen vs. Ottenheimer*, 13 *Oreg.*, 220, it was held not sufficient under the code to assign as ground that the complaint was "multifarious."

s. p., *Dewey vs. Ward*, 12 *How. Pr.*, 419.

§ 407. *Joint or separate.*—If the causes of action joined do not affect all the defendants, all may jointly demur¹ for misjoinder of causes of action, or any one of them may so demur² severally, whether he is affected by all the causes or only by one or more of them.³

¹ *Hess vs. Buffalo & Niagara Falls R. R. Co.*, 29 *Barb.* (N. Y.), 391.

Hoffman vs. Wheelock, 62 *Wis.*, 434; s. c., 22 *Northw. Rep.*, 713.

² *Barton vs. Spies*, 5 *Hun* (N. Y.), 60.

³ *Nichols vs. Drew*, 94 *N. Y.*, 22. (This is not a mere misjoinder of parties.)

s. p., *Barton vs. Speis*, 5 *Hun* (N. Y.), 60.

Edson vs. Girvan, 29 *id.*, 422.

Hoffman vs. Wheelock (above cited).

Compton vs. Hughes, 38 *Hun* (N. Y.), 377.

[*Compare*, *Oakley vs. Tugwell*, 33 *Hun* (N. Y.), 357. (Holding that a joint demurrer cannot be sustained, as to one of the parties demurring, when it is overruled as to the others, citing *N. Y. & New Haven R. R. Co. vs. Schuyler*, 17 *N. Y.*, 592; and see § 14.)]

B. *Objections for Misjoinder of Causes of Action as affected by the question. What is a Single Cause of Action?* [See also subd. D.]

§ 408. *Separate statement of elements of a single cause of action.*—Where a complaint clearly states facts con-

stituting a single cause of action, an error of the pleader in grouping the allegations in separate counts as if constituting several causes of action, is not necessarily fatal on demurrer for misjoinder.

Brown vs. Carbonate Bank of Leadville, 34 *Fed. Rep.*, 776. (Allegation that defendant surreptitiously took assets from director; coupled with allegation that the corporation, in contemplation of insolvency, transferred the assets to defendant.)

Morse vs. Frost, 54 *Conn.*, 84. (Action to recover price of land sold. Complaint setting forth notes as separate causes of action.)

Langsdale vs. Woollen Adm'r, 120 *Ind.*, 16.

Tootle vs. Wells, 39 *Kan.*, 452.

Rice vs. Coolidge, 121 *Mass.*, 393.

Brooks vs. Ancell, 51 *Mo.*, 178.

Welch vs. Platt, 32 *Hun (N. Y.)*; s. c., 5 *Civ. Pro.* (Overruling demurrer for misjoinder.)

Madge vs. Puig, 12 *Hun (N. Y.)*, 15 (several breaches of one contract; [rev'd on another point in 71 *N. Y.*, 608]).

§ 409. *Commingled statement*.—The objection to commingling facts constituting several causes of action or defences by stating them as if they constituted but one, is not available under a demurrer for misjoinder.¹

But if the causes of action or defences so commingled are not joinable in the same pleading, a demurrer for misjoinder must be sustained notwithstanding the commingling.²

¹ *United States vs. Ordway*, 30 *Fed. Rep.*, 30. (Trespass on public lands. Objection that allegations of good faith, made by way of mitigating damages, were not separately stated, not available on demurrer.)

Tootle vs. Wells, 39 *Kans.*, 452 (*dictum*).

Hayford vs. Thacher, 65 *Cal.*, 389; s. c., 3 *West Coast Rep.*, 292; *Fraser vs. Oakdale Lumber & Water Co.*, 73 *Cal.*, 187; s. c., 14 *Pac. Rep.*, 829.

Tootle vs. Wells, 39 *Kans.*, 452.

Otis vs. Mechanics' Bank, 35 *Mo.*, 128; s. p., *State vs. Davis*, *id.*, 406.

Bass vs. Comstock, 38 *N. Y.*, 21; *Woodbury vs. Sack-
rider*, 2 *Abb. Pr. (N. Y.)*, 402.

Township of Hartford *vs.* Bennett, 10 *Ohio St.*, 443 ; Akerly *vs.* Vilas, 25 *Wisc.*, 703 ; Nichol *vs.* Alexander, 28 *id.*, 118 ; Sentinel Company *vs.* Thomson, 38 *id.*, 489.

¹ Wiles *vs.* Suydam, 64 *N. Y.*, 173, rev'g 3 *Hun*, 604 ; s. c., 6 *Supm. Ct. (T. & C.)*, 292.

Goldberg *vs.* Utley, 60 *N. Y.*, 427.

Zorn *vs.* Zorn, 38 *Hun*, 67.

Harris *vs.* Eldridge, 5 *Abb. N. C.*, 278.

§ 410. *Several grounds for a single recovery.*—It is the better opinion that, under the New Procedure, as well as in Equity, several grounds for the same recovery may be stated as a single cause of action, and the complaint will not be demurrable for misjoinder.¹

Under the New Procedure it is no objection that some of the grounds are of a legal and others of an equitable nature.²

¹ Loveland *vs.* Garner (*Cal.*, 1887), 12 *Pacif. Rep.*, 616.

Under a statute imposing a penalty, the true construction of which allows but one penalty for any number of violations, a complaint alleging several distinct violations and even demanding as many penalties, only states one cause of action, and is not demurrable. The Court say : " As the statute in terms provides for but a single penalty of \$1,000, no other or greater sum can be recovered although violations of the statute may have been frequent. But it does not follow from this that the plaintiff may not join together in one count several of such alleged violations, and prove any one of them in his power, as they constitute separately or together but one cause of action." Judgment for defendant therefore reversed.

Barber Asphalt Paving Co. *vs.* Gogreve (*La.*), 5 *So. Rep.*, 848. (Exception because petition enabled plaintiff to rely upon either of two statutory grounds in the alternative, not sustainable.)

Williams *vs.* Lowe, 4 *Neb.*, 382. (Equitable action, both on the ground that sale was void, and that the purchaser was chargeable as a trustee.)

Thompson *vs.* Minford, 11 *How. Pr. (N. Y.)*, 273. (Contract or judgment, and original consideration.)

s. p., Walters *vs.* Continental Ins. Co., 5 *Hun (N. Y.)*, 343 ;

Durant *vs.* Gardner, 10 *Abb. Pr. (N. Y.)* 445 ; 19 *How. Pr.*, 94.

Everitt vs. Conklin, 90 *N. Y.*, 645; s. c., 15 *Weekly Dig.*, 540. (Action for money received, alleging that plaintiff made a note to defendant as an accommodation, and had to pay it. That the note was made under an agreement that plaintiff might have it applied on a contract with defendant, which contract defendant broke and plaintiff rescinded.)

[See cases collected in 24 *Abb. N. C.*, 326.]

[Compare *Armstrong vs. Wing*, 10 *Hun (N. Y.)*, 520. Holding that defendant cannot be charged in the same count both as heir and next of kin, for debt of decedent.]

Phillips vs. Gorham, 17 *N. Y.*, 270. (The leading case.) (Action for recovery of land. *Held*, that plaintiff had a right to attack the deed under which defendant claimed title, both upon legal grounds and upon such as before the Code were of purely equitable cognizance. That so far as substance is concerned a complaint needs only to contain facts to constitute a cause of action, recognizing no distinction of causes of action into legal or equitable.)

Compare *Oakville Company vs. Double Pointed Tack Co.*, 105 *N. Y.*, 658; s. c., 7 *Cent. Rep.*, 720. (Action to reform contract for mistake. The trial court found on sufficient evidence as matter of fact, that no mistake existed, the substantial purpose of the action being thereby defeated. *Held*, upon appeal, that plaintiff could not raise the further question of the construction of the contract and insist that its true meaning is precisely what it would have been if the instrument were reformed as asked. That such a question was a purely legal one and did not belong to the equitable action. No ground existed for the interposition of equity.)

§ 411. *Several demands for relief on same facts.*—

Under the New Procedure, a demand for several kinds of equitable relief,¹ or for both legal and equitable relief,² or for alternative relief,³ appropriate to the same state of facts and the same parties, is not a misjoinder, for these do not necessarily make more than one cause of action.

¹ *Hammond vs. Cockle*, 2 *Hun (N. Y.)*, 495; s. c., 5 *Suprm. Ct. (T. & C.)*, 56. (Complaint for several kinds of relief, e.g. to set aside a deed, partition of premises and have dower assigned, is not necessarily a complaint for several causes of action.)

People vs. Metropolitan Telephone Co., 31 *Hun (N. Y.)*,

596, 598. (Action to restrain the completion of a telephone line, to remove its incomplete line as a nuisance, and to restore the street where it was located to its original condition.)

Day vs. Stone, 15 *Abb. N. S. (N. Y.)*, 137; 5 *Daly*, 353. (A complaint in an action against the administrator of a deceased agent for an accounting, etc., demanded judgment against the administrator individually for the payment of money and the delivery of books and property of plaintiff, which came to deceased as such agent, and which defendant refused to deliver. *Held*, not to unite two causes of action.)

² *Ely vs. New Mexico & Ariz. R. Co.*, 19 *Pacif. Rep.*, 6. (*Dic-tum*, as to statutory action for possession, and to determine conflicting claims; not a question of misjoinder; but the court say both are a single cause of action.)

Sullivan vs. Sullivan M'fg Co., 14 *S. C.*, 494. (In action upon a note and an account of a corporation against the corporation and its directors, the complaint demanded judgment, (1) for the amount due on the note and account, against the corporation; (2) judgment against the directors for said amount; (3) that the corporation be dissolved; (4) that an assignment by it be set aside; (5) that the company and its officers be restrained from exercising corporate rights. *Held*, on demurrer for misjoinder of several causes of action that the question could not be raised whether plaintiff was entitled to any or all of the reliefs demanded.)

Keens vs. Gaslin, 24 *Neb.*, 310. (A petition which sets forth a cause of action to remove a cloud from title and in a second count pleads a cause of action in ejectment for the same land involved in the first cause of action is not demurrable for misjoinder; as in such a case there is but one cause of action, although different forms of relief are sought. Such a petition is only subject to a motion to strike out or to require the plaintiff to elect.)

¹ *Henry vs. McKittrick*, 42 *Kan.*, 485. (Action to compel the specific performance of a contract to convey certain land, and praying damages in case for sufficient reason this could not be done. *Held*, error to sustain a demurrer for misjoinder. The cause of action was plaintiff's right and defendant's wrong, and asking alternative relief does not amount to two causes of action.)

Scoggins vs. Smith, 31 *S. C.*, 605. (*It seems* complaint for specific performance of a contract to devise, or for the value of services rendered under such contract, does not improperly join separate causes of action. No objection was made at trial.)

§ 412. *Incidental demands*.—The same principle applies alike where the main object of the action is specific equitable relief, and damages are asked as incidental to the same wrong;¹ where the main object of the action is recovery of a money judgment or of possession of specific real or personal property² (usually sought by ejectment and replevin), or specific equitable relief³ and incidental equitable relief such as the reformation of an instrument is asked as a necessary preliminary, or the cancellation of an instrument is asked in order to avoid an anticipated defence.

¹ *Grandona vs. Loydal*, 70 *Cal.*, 161. (Action to abate nuisance, and for damages. *Held*, not a misjoinder.)

Bailey vs. Dale, 71 *Cal.*, 34. (Action to abate nuisance and for penalty, not a misjoinder.)

² *Shepard vs. Manhattan Ry. Co.*, 24 *N. Y. State Rep.*, 185. (Action to enjoin maintaining elevated railroad, and for damages, only a single cause of action.)

Trowbridge vs. True, 52 *Conn.*, 190. (Injunction and damages for excavating land adjoining plaintiff. The Court say: "Where each relief is asked upon precisely same facts no good reason why they should be repeated in a second count.") [This, however, arose on motion, and not on demurrer.]

Akin vs. Davis, 11 *Kan.*, 580. (Action for damages for overflowing lands, and injunction against continuance, *held*, not a misjoinder.)

Duvall vs. Tinsley, 54 *Mo.*, 93. (A claim for specific performance and for rents and profits may be united. Such petition is not multifarious, as there is but a single cause of action.)

Hutchinson vs. Ainsworth, 73 *Cal.*, 452. (Foreclosure and reformation of mortgage. Citing *Pom. on Remedies*, 459; *Meyer vs. Van Collem*, 7 *Abb. Pr.*, 222; *McClurg vs. Phillips*, 49 *Mo.*, 315.)

s. p., *Miller vs. Kalb*, 47 *Ind.*, 220.

Hunter vs. McCoy, 14 *Ind.*, 528. (A deed may be reformed and title quieted in the same action.)

Zimmerman vs. Kinkle, 108 *N. Y.*, 287. (Action by executors and trustees to cancel a bond as immoral and contrary to public policy, and to recover money deposited to secure a surety thereon. *Held*, the com-

plaint did not improperly join two causes of action. The object of the suit was single—to have the money restored to the trust fund from which it was taken. The right to that relief would follow from the cancellation of the bond.)

Miller vs. Coates, 66 *N. Y.*, 609, rev'g 4 *Suprm. Ct. (T. & C.)*, 429. (Action for accounting. Allegation of release wrongfully exacted, and prayer that it be surrendered, not necessary, but did not vitiate.)

s. P., *Wade vs. Rusher*, 4 *Bosw. (N. Y.)*, 537.

Henderson vs. Henderson, 44 *Hun*, 420. (For removal of cloud, and partition.)

Standart vs. Burtis, 46 *Hun*, 82, 86; 15 *N. Y. S. R.*, 145.

(In an action by taxpayers to restrain city officials from satisfying a judgment for an amount less than is due thereon, and from substituting another attorney in the place of the attorney who recovered the judgment, a prayer for relief asking a perpetual injunction restraining the settling, satisfying, etc., of the judgment, and the substitution of any attorney in the place of the plaintiff's attorney, states but one cause of action.)

Tisdale vs. Moore, 8 *Hun (N. Y.)*, 19. (In mechanics' lien, a complaint which seeks to enforce the lien and joins as defendants parties to conveyances alleged to be fraudulent, and asks that the conveyances be declared void, sets up only one cause of action.)

Globe Ins. Co. vs. Boyle, 21 *Ohio St.*, 119. (Under the code it is not improper to render judgment for reformation of a contract, and its enforcement, in the same action.)

Moon vs. McKnight, 54 *Wis.*, 551. (To have a deed declared a mortgage, for its foreclosure, and to set aside a subsequent deed as a forgery, may be joined; the relief sought being essential and a prerequisite to plaintiff's right of foreclosure.)

* *Welch vs. Platt*, 32 *Hun*, 194. (Conversion. Allegation that plaintiff had given defendant a chattel mortgage on the goods, but that it was void for usury, and prayer that it be cancelled. *Held*, merely incidental to plaintiff's title and right to recover for the conversion.)

Van Voorhis vs. Kelly, 31 *Hun*, 293. (Ejectment. Allegations showing that defendant's claim of title was fraudulent, not improper. As to the allegations of fraudulent proceedings, etc., the Court say that these do not deprive the action of its character as an action to recover the possession of the property. They merely indicate the grounds on which such proceedings should be set aside; and were properly made to ap-

prise defendants of the objections made to the title under which defendants hold possession. Citing *Lattin vs. McCarty*, 41 *N. Y.*, 107; *Phelps vs. Gorham*, 17 *id.*, 270.

Gooding vs. McAlister, 9 *How. Pr. (N. Y.)*, 123. (A complaint seeking to have a written contract reformed and for judgment thereon when reformed states but a single cause of action.)

s. p., *Weinberger vs. Merchants' Ins. Co. (La., 1888)*, 5 *So.*, 728.

Rigsbee vs. Trees, 21 *Ind.*, 227. (A mistake in a promissory note in the amount for which it was given may be reformed and judgment rendered for the amount due.)

Under the *Indiana Rev. Stats. § 280*, allowing plaintiff to join such other matter in his complaint as may be necessary for a complete remedy and speedy satisfaction of his judgment, the same proceedings may include the collection of a debt and the setting aside of a fraudulent conveyance.]

Bowen vs. State ex rel., 121 *Ind.*, 235. [Citing *Hamilton vs. Barricklew*, 96 *Ind.*, 398; *Carr vs. Huette*, 73 *id.*, 378; *Lindley vs. Cross*, 31 *id.*, 106; *Frank vs. Kessler*, 30 *Ind.*, 8.]

§ 413. *Inconsistent relief*.—If the facts stated constitute but a single cause of action for which some of the relief asked is appropriate, the objection that relief appropriate only for another cause of action not stated is also asked, will not sustain a demurrer for misjoinder of causes of action.

Colstrum vs. Minneapolis & St. L. R'y Co., 31 *Minn.*, 367. (Allegations of an unlawful entry and occupation by defendant, and demand of judgment both for possession and for an injunction restraining the continuance of the trespass.)

s. p., *Hiles vs. Johnson (Wisc., 1886)*, 30 *North West.*, 721.

§ 414. *Aggravation, though such as might be a cause of action by itself*.—Where a sufficient cause of action for a tort is well pleaded, the addition of matter of aggravation to enhance the damages is not a misjoinder,

even though such matter might suffice to make out a cause of action by itself, such as could not be joined with the cause alleged as the gravamen of the action.

Grant vs. McCarthy, 38 *Iowa*, 468. (Injury to personal property of joint tenants; assault on them inflicted at the same time may be also alleged. *Dictum*.)

s. p., in action for trespass to realty, allegations of insult to plaintiff's wife. *Bennett vs. McIntyre* (*Ind.*, 1889), 23 *North E. Rep.*, 78; *Razzo vs. Varni* (*Cal.*), 21 *Pacif. Rep.*, 762.

Belden vs. Granniss, 27 *Conn.*, 511. (A count in trover, and another alleging forcible taking possession of plaintiff's premises, seizing goods, interrupting of business, etc. Motion in arrest for misjoinder denied. *Held*, that these were not separate causes of action; there being no appropriate allegation of breaking, etc., for trespass to realty.)

Cincinnati, Ham. & Day. R. Co. vs. Chester, 57 *Ind.*, 297. (Negligence; to the injury of plaintiff's person and also loss of service; and incurring of medical expenses.)

Whatling vs. Nash, 41 *Hun* (*N. Y.*), 579. (Trespass to real property; with allegation of injuries to personal property.)

Gilbert vs. Pritchard, 41 *Hun*, 46; s. c., 2 *N. Y. State Rep.*, 663. (Refusal to compel separate statement.)

[*Contra*, *Gunn vs. Fellows*, 41 *Hun*, 257.]

s. p., *Bebinger vs. Sweet*, 1 *Abb. N. C.* (*N. Y.*), 263; s. c., 6 *Hun* (*N. Y.*), 478; *Sheldon vs. Lake*, 9 *Abb. Pr. N. S.*, 306; *Exner vs. Exner*, 2 *Abb. N. C.* (*N. Y.*), 108. (Injuries to person and property, etc.)

Brewer vs. Temple, 15 *How. Pr.* (*N. Y.*), 286. (Assault and battery with allegations of defamation in the same transaction. [*Contra*, *Anderson vs. Hill*, 53 *Barb.* (*N. Y.*), 238.]

s. p., on motion to strike out. *Root vs. Foster*, 9 *How. Pr.* (*N. Y.*), 37.

C. *Objections to Misjoinder of Causes of Action turning on the Nature of the Claims.*

§ 415. *Contract and tort.*—At Common Law, contract and tort cannot be joined.¹

Under the New Procedure, separate claims on contract and for tort cannot be joined in an action of a legal

nature, unless the statute, expressly or by implication, sanctions it.²

It is, however, the better opinion that in those States where the statute allows causes of action "arising out of the same transaction" to be joined, contract and tort may be joined if so arising.³

But to resist, on this ground, a demurrer for the misjoinder of causes which otherwise could not be joined, it must appear by the complaint that they did arise out of the same transaction.⁴

¹ *Noetling vs. Wright*, 72 *Ill.*, 390.

Pennsylvania R. Co. vs. Zug, 47 *Pa. St.*, 480.

But under the present practice in several common-law procedure States, trespass and trespass on the case may be joined. *Barker vs. Koozier*, 80 *Ill.*, 205; *Black vs. Howard*, 50 *Vt.*, 27; *Hagar vs. Brainard*, 44 *id.*, 292.

² In *Colorado* (*Sess. Laws, Code Civ. Pro.*, 1887, § 70) may be joined "All actions sounding only in damages, whether the same be for breach of contract sealed or parol, express or implied, or for injuries to property, person or character, or for any two or more of these causes; and in all cases it shall be necessary to state separately in the complaint the different causes for which the action is brought, and in all cases equitable relief may be granted."

In *Connecticut* (*Practice Act, Gen. Stat.* 1888, § 878) may be joined claims, whether in contract or tort, or both, arising out of the same transaction or transactions connected with the same subject of action.

In *Florida* (*McClellan's Dig. of L.*, 1881, c. 162, § 71), causes "of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit; but this shall not extend to replevin or ejectment."

In *Georgia* (*Code*, 1882, § 3261), contract and tort cannot be joined. *McLendon vs. Westpoint & C. R. Co.*, 54 *Ga.*, 293, 296. (Trespass and use and occupation.)

In *Illinois*, debt and case cannot be joined. *Confrey vs. Stark*, 73 *Ill.*, 187. Nor breach of contract and deceit. *Noetling vs. Wright*, 72 *id.*, 390.

In *Indiana* (*Civil Pro.* 1881; *Rev. Stat.* 1888, c. 2, § 278 [106]) contract and tort cannot be joined. *Bayer vs. Tiedman*, 34 *Ind.*, 72; *Clark vs. Leneberger*, 44 *id.*, 223.

In *Iowa Code*, § 2630, permitting the joinder of causes of whatever kind, where each may be prosecuted in the same proceedings, it is no objection that the claims are not consistent. *Foster vs. Hinson*, 76 *Iowa*, 714. (Claim for rent under implied contract and for damages for the wrongful occupation.) *Turner vs. First National Bank*, 26 *id.*, 562. (Fraudulent embezzlement of bonds and contract to safely keep.)

In *Massachusetts* (*Public Stats. of 1881-2*, c. 162, § 1), it is provided that "Actions of contract and actions of tort shall not be joined; but when it is deemed doubtful to which of those classes a particular cause of action belongs, a count in contract may be joined with a count in tort averring that both are one and the same cause of action." *Teague vs. Irwin*, 134 *Mass.*, 303; *Mahon vs. Blake*, 125 *id.*, 477, and cases cited. To same effect even though the writ is entitled as on contract, *Hulet vs. Pixley*, 97 *id.*, 29. Otherwise if the claim on contract rests on a waiver of the tort. *Clapp vs. Campbell*, 124 *id.*, 50. It must appear that both counts are for one and the same cause. *Kellogg vs. Kimball*, 122 *Mass.*, 163.

In *Minnesota* (*Gen. Stats. 1878*, c. 66, § 118 [Sec. 98]), tort and contract arising out of the same transaction may be joined. *Humphrey vs. Merriam*, 37 *Minn.*, 502, and cases cited; s. c., 35 *North West. Rep.*, 365.)

Also allowed in New Hampshire under a statute similar to Mass. *Crawford vs. Parsons* 63 *N. H.*, 438; s. c., 3 *East. Rep.*, 492.

* Causes of action otherwise not joinable may be united when they arise out of the same transaction. *Polley vs. Wilkinson*, 5 *Civ. Pro. R.*, 135. [*Contra*, *Teall vs. City of Syracuse*, 32 *Hun*, 332; *Sullivan vs. N. Y., N. H., etc., R. R. Co.*, 11 *Fed. Rep.*, 848; s. c., 61 *How. Pr.*, 490; *Lee Bank vs. Kitching*, 7 *Bosw. (N. Y.)*, 664; s. c., 11 *Abb. Pr.*, 435 (*dictum*, the point decided being that the objection was too late at trial).]

See also § 87.

Jones vs. Johnson, 10 *Bush (Ky.)*, 649. (An action by a stockholder against an assignee of a railroad for neglecting to sue the officers of the company, and against the officers to recover the company's money misappropriated by them, may be joined, notwithstanding the suit to settle the trust is founded on contract, and right of action against the officers on tort, as both are connected with the same transaction.)

Under the *Iowa Code*, § 2630, permitting the joinder of

causes of whatever kind where they all may be prosecuted in the same kind of proceedings provided they affect all the parties, etc., contract and tort may be joined. *Jack vs. Des Moines & Ft. W. Ry. Co.*, 49 *Iowa*, 627.

[In *New York* the question is complicated by the recent amendment to the sections authorizing arrest for tort, which prescribes that the ground of arrest must be alleged in the complaint, and that when so alleged plaintiff cannot recover unless he proves it. (*Code Civ. Pro.*, §§ 549, 550.) It is, however, also settled that by joining a cause of action on which defendant may be arrested with one on which he cannot, he waives the right to arrest; and also that allegations inserted merely for the purpose of showing a right to arrest do not change a cause of action on contract into a cause of action for tort; and moreover that the rule that plaintiff cannot recover unless he proves at the trial the ground of arrest alleged by him may be met by allowing amendment at the trial striking out the unproved allegations, and then giving judgment as if they had not been inserted. For the object of the amendment was to prevent a plaintiff who recovers on a record showing only a contract following it by a body execution on questions of fraud not tried. Under these rules, considered together, there seems to be no good reason why contract and tort arising out of the same transaction may not be joined in *N. Y.* as well as elsewhere.]

* *Gertler vs. Linscott*, 26 *Minn.*, 82.

Flynn vs. Bailey, 50 *Barb.*, 73. (Holding that the general allegation was not enough, but facts by which the court could see the identity must be stated.)

[Compare *Pearson vs. Milwaukee, etc., R. Co.*, 45 *Iowa*, 497; *Summerville vs. Metcalf*, 15 *N. Y. Weekly Dig.*, 154; *Ford vs. Mattice*, 14 *How. Pr. (N. Y.)*, 91; *Carney vs. Bernheimer*, 3 *N. Y. Month. L. Bul.*, 22; *Smith vs. Douglass*, 15 *Abb. Pr. (N. Y.)*, 266.

§ 416. — *electing between contract and tort.*—It is consonant with the principles of Equity and of the New Procedure to hold that even where plaintiff cannot recover both upon a contract and upon a tort committed in the same transaction, yet his pleading both is not a misjoinder unless a material (i.e., essential) fact in one is absolutely inconsistent with the truth of such a fact in

the other. In this view a claim to recover damages for a breach of contract is joinable with a claim for damages for deceit in inducing the making of the contract, although plaintiff may usually be required to elect before the close of the trial; but it is not joinable with a claim treating the contract as absolutely void by reason of such deceit, for one rests on an election to affirm the contract, the other on its disaffirmance.

But the majority of the authorities hold that, in actions of a legal nature, if facts alleged are such as to require plaintiff to elect before recovery, the objection is available on demurrer for misjoinder.

Woodbury vs. Delap, 1 *N. Y. Supm. Ct. (T. & C.)*, 220.

(Count for deceit, and a count for money received by means of such deceit, may be joined.)

And see note 1 to next section.

[*Contra*, *Bowman vs. Partell*, 47 *N. Y. Super. Ct. (J. & S.)*, 403; 12 *N. Y. Weekly Dig.*, 307. (Fraud; and money had and received thereby not joinable.)

Teall vs. City of Syracuse, 32 *Hun (N. Y.)*, 332; *Dodge vs. Glendenning*, 10 *N. Y. State Rep.*, 8. (Money received, and conversion, not joinable.)]

[*Sweet vs. Ingerson*, 12 *How. Pr. (N. Y.)*, 331. (Warranty, and deceit.)]

[*s. p.*, *Springsteed vs. Lawson*, 14 *Abb. Pr. (N. Y.)*, 328.]

[*Henderson vs. Boyd*, 85 *Tenn.*, 21, 1 *South West.*, 498. (Trespass for personal injuries; and compromise of plaintiff's claim for damages therefor.)

[See statutes in note to preceding section.]

§ 417. *Warranty and false representations*.—Whether it is allowable to unite a cause of action upon a contract,—as for instance a warranty of a chattel sold,—with a cause of action for false representations inducing the contract, compare the following cases:

Affirmative.—*Robinson vs. Flint*, 7 *Abb. Pr. (N. Y.)*, 393, note. (False representations in inducing plaintiff to contract, and a breach of the same contract, may be joined. "Transaction" means the whole proceedings, commencing with the negotiation and ending with the

performance of the contract, where the matter in controversy arises out of a contract.)

Humphrey vs. Merriam, 37 *Minn.*, 502; s. c., 35 *North West. Rep.*, 365 [citing *Gertler vs. Linscott*, 26 *Minn.*, 82.]

In the *Director (Cir. Ct. Oregon)*, 36 *Fed. Rep.*, 335, on appeal from the District Court in an action to recover damages for breach of warranty of seaworthiness, *held* proper to join a cause of action for the possession of wheat delivered under the warranty.)

Negative.—*Mitchell vs. Georgia R. R. Co.*, 68 *Ga.*, 644. (Damages for breach of contract for transportation of live stock. *Held*, amendment charging fraudulent and deceitful representations as to capacity and construction of cars to induce shipment by plaintiff could not be allowed. [See the Georgia statute under § 415.]

Seymour vs. Lorillard, 8 *Civ. Pro. R. (N. Y.)*, 90. (Warranty, and deceit.)

§ 418. *Express and implied contract.*—A cause of action upon a contract implied by waiving the tort is a cause of action upon contract, and may be united with another cause of action upon contract.

Stewart vs. Balderston, 10 *Kan.*, 131.

Tregent vs. Maybee, 54 *Mich.*, 226; s. c., 19 *Northw. Rep.*, 962. By the Court, SHERWOOD, J. (Action in *assumpsit* for fraudulently obtaining money by transfer of shipping receipt accompanied by false statement of B. (who was alleged to be acting for defendants) that the property had been shipped. Plaintiff alleged the common counts, and also a special one charging the fraudulent detaining of the money, and waiving the tort. Motion to compel election refused. Under the Michigan statute *assumpsit* lies in this case, and any other causes maintainable in the same form of action may be joined with it in the same suit. The Court reasoned that it was no ground of objection that the facts constituting the wrong were stated in the special count, as they must be proved in order to recover, and therefore must be stated. The defendants could make any defence to that count that they might if the common counts had not been added; and there was no reason why plaintiff should not join all the causes he had when recovery might be had in each in the same form of action in separate suits.)

Contracts express or implied may now generally be joined.

Alabama—*Code* (1886) § 2672; *Mansf. Dig.*; *Arkansas*—(1884), § 5014; *California*—*Code Civ. Pro.*, § 427; *Colorado*—*Code Civ. Pro.* (1887), § 70; *Connecticut*—*Pr. Act, Gen. Stat.* (1888), § 878; *Florida*—*McClell. Dig.* (1881), c. 162, § 71; *Idaho*—*Code Civ. Pro., R. S.* (1887), § 4169; *Indiana*—*Civ. Pro.* (1881), *R. S.* (1888), c. 2, § 278 (106). [Here the statute is “money demands on contract,” and “express or implied” is not added.] *Kansas*—*Civ. Pro.*, § 83, *Gen. Stat.* (1889), § 4166; *Kentucky*—*Code Civ. Pro.*, § 83; *Minnesota*—*Gen. Stat.* (1878), c. 66, § 188 (Sec. 98); *Missouri*—*Rev. Stat. of 1889*, § 2040; *Montana*—*Code Civ. Pro.*, § 86; *Nebraska*—*Code Civ. Pro.*, § 87; *Nevada*—*Gen. Stat.*, § 3086; *New York*—*Code Civ. Pro.*, § 484; *Ohio*—*Rev. Stat.*, § 5019; *Oregon*—1 *Hill's Stat.* § 93; *South Carolina*—*Rev. Stat.*, tit. v. c. 22, § 190; *Utah*—*Comp. L.*, § 3220; *Wisconsin*—*Rev. Stat.* (1889), § 2647.

§ 419. *Covenant and trespass*.—A cause of action for trespass, and a cause of action for the breach of a covenant for quiet enjoyment occasioned by the same trespass, do not arise out of the same transaction within the meaning of the statutes relating to joinder of causes.

Ederlin vs. Judge, 36 *Mo.*, 350.

Keep vs. Kaufman, 56 *N. Y.*, 332. (Covenant for quiet enjoyment in a lease: trespass in entering the apartments so leased with false keys, breaking open his trunks, and maliciously and feloniously removing and injuring his property, cannot be joined.)

Followed in *Thompson vs. St. Nicholas Nat. Bk.*, 61 *How. Pr.* (*N. Y.*), 163, and *Week vs. Keteltas*, 10 *N. Y. Civ. Pro. R.*, 43.

§ 420. *Injuries to person, character, and property*.—It is the better opinion that under the usual statutory provision allowing joinder of claims arising out of the same transaction, claims for injuries to the person, to the character, and to the property of the plaintiff may be joined.

Heigle vs. Willis, 50 *Hun.*, 588. (Collision with injury to person and to property.)

Grogan vs. Lindeman, 1 *Code R. N. S.*, 287.

s. p., *Polley vs. Wilkisson*, 5 *Civ. Pro. R.*, 135.

Contra, Taylor vs. Metrop. Elev. Ry. Co., 52 *Super. Ct. (J. & S.)*, 299.

Even when not arising out of the same transaction, several claims arising from injuries to character may be joined in the following States :

Arkansas—*Mansf. Dig.* (1884), § 5014; *California*—*Code Civ. Pro.*, § 427; *Colorado*—*Code Civ. Pro.* (1887), § 70; *Connecticut*—*Practice Act, Gen. Stat.* 1888, § 878; *Idaho*—*Code Civ. Pro., Rev. Stat.* (1887), § 4169; *Kansas*—*Code Civ. Pro.*, § 83, *Gen. St.* 1889, ¶ 4166; *Kentucky*—*Code Civ. Pro.*, § 83; *Minnesota*—*Gen. Stat.*, 1878, c. 66, § 118 (§ 98); *Missouri*—*Rev. Stat. of* 1889, § 2040; *Montana*—*Code Civ. Pro.*, § 86; *Nebraska*—*Code Civ. Pro.*, § 87; *Nevada*—*Gen. Stat.*, § 3086; *Ohio*—*Rev. Stat.*, § 5019; *Oregon*—1 *Hill's Stat.* 1887, § 93; *South Carolina*—*Rev. Stat.*, tit. v. c. 22, § 190; *Utah*—*Comp. L.*, § 3220; *Wisconsin*—*R. S.*, § 2647.

In *New York*, personal injuries except libel, slander, criminal conversation or seduction, are one class, and libel or slander a separate class. *N. Y. Code Civ. Pro.*, § 484.

Injuries to person and property, although not arising out of the same transaction, may be joined in the following States :

Arkansas—*Mansf. Dig.* (1884), § 5014; *Colorado*—*Code Civ. Pro.* (1887), § 70; *Connecticut*—*Pr. Act, Gen. Stat.* 1888, § 878; *Kansas*—*Civ. Pro.*, § 83, *Gen. Stat.* (1889), ¶ 4166; *Kentucky*—*Code Civ. Pro.*, § 83; *Minnesota*—*Gen. Stat.* 1878, c. 66, § 118 (Sec. 98); *Missouri*—*Rev. Stat.* 1889, § 2040; *Nebraska*—*Code Civ. Pro.*, § 87; *Ohio*—*Rev. Stats.*, § 5019; *South Carolina*—*R. S.* t. v, c. 22, § 190; *Wisconsin*—*Rev. Stats.* (1889), § 2647.

In the following States injuries to person and injuries to property are stated as separate classes, not joinable as such :

California—*Code Civ. Pro.*, § 427 (but an action for malicious arrest or prosecution, or either of them, may be joined with an action for either an injury to character or to the person); *Idaho*—*Civ. Pro. Rev. Stat.* (1887), § 4169; s. p., *Indiana*—*Civ. Pro.*, 1881, *R. S.* 1888, c. 2, § 278 (106); *Montana*—*Code Civ. Pro.*, § 86; *Nevada*—*Gen. Stat.*, § 3086; *New York*—*Code Civ. Pro.*, § 484; *Oregon*—1 *Hill's Stat.*, § 93; *Utah*—*Comp. Laws*, § 3220.

In *California*—*Code Civ. Pro.*, § 427; *Idaho*—*Code Civ. Pro., R. S.*, 1887, § 4169; *Montana*—*Code Civ. Pro.*, § 86; *Nevada*—*Gen. Stat.*, § 3086; *Oregon*—1 *Hill's Stat.*, § 93; *Utah*—*Comp. L.*, § 3220, claims for injuries to character and claims for injuries to the person or to property are three separate classes, not joinable as such.

In *Indiana*—*Civ. Pro.* (1881), *Rev. Stat.* (1888), c. 2, § 278 (106), injuries to property are one class, and those to person and character a separate class.

In *Kansas*—*Civ. Pro.* § 83, *Gen. Stat.* (1889), ¶ 4166; *Kentucky* (*Code Civ. Pro.*, § 83), *Minnesota* (*Gen. Stat.* 1878, c. 66, § 118 [§ 98]), *Missouri* (*R. S.* of 1889, § 2040), *Nebraska* (*Code Civ. Pro.*, § 87), *Ohio* (*R. S.*, § 5019), *South Carolina* (*R. S.*, t. v, c. 22, § 190), and *Wisconsin* (*R. S.*, § 2647), injuries to character form one class and those to person and property a separate class.

In *Colorado*, all actions sounding in damages may be joined.

In *Florida*, causes of whatever kind.

In *Georgia*, all actions *ex delicto*.

In *Massachusetts*, all tort (not including replevin).

§ 421. *Common-law liability, and penalty, or statutory liability.*—It is the better opinion that where the statute allows causes of action arising out of the same transaction to be joined, a cause of action on a common-law liability, whether by contract or for negligence or tort, may be joined with a cause of action on a statutory liability arising on the very same facts.¹

Otherwise of a statutory liability first arising upon delinquencies subsequent to the transaction raising the common-law liability, although relating to the same object of action.²

¹ *Stockwell vs. United States*, 3 *Cliff.* (*U. S.*), 284. (Debt for duties, and double value for penalties, joinable.)

And see also *Patterson's Railw. Ac. L.*, 395.

[*Contra*, *Louisville, E. & St. L. R. Co. vs. Hill*, 29 *Ill. App.*, 582; *Kendrick vs. Chicago & A. R. Co.*, 81 *Mo.*, 521. (Common-law action for negligence, and statutory action for the same injury upon neglect to give signal, not joinable.)

[*Contra* also *Scott vs. Robards*, 67 *Mo.*, 289. (Because the recovery would be different—in the one case actual damages, in the other the penalty.)

[The better view is that this is ground for compelling election at the trial rather than for demurrer.]

Fairfield vs. Burt, 11 *Pick. (Mass.)*, 244. (Count in trespass on common-law liability, and count on statute allowing trespass for double damages, on same matter.)

Worster vs. Proprietors of Canal Bridge, 33 *Mass.* (16 *Pick.*),

541. (Count at common law for actual damages may be joined with one on a statute, although the statute gave double damages; for the form of action, the plea and judgment are the same.) [The statute as to double damages is only a direction to the Court to proceed after single damages have been assessed. *Clark vs. Worthington*, 29 *Mass.* (12 *Pick.*), 571.]

Compare Cincinnati, etc., R. R. Co. vs. Cook, 37 *Ohio St.*, 265. (The petition set forth two causes of action, each charging the defendant, a railroad, with overcharging for fare, and sought to recover the penalty therefor. *Held*, on demurrer, that the causes could be joined, as they both constituted injuries to property.)

[*Contra*, *Keyes vs. Prescott*, 32 *Vt.*, 86. (A count for treble damages allowed by statute for the cutting down and carrying away a tree cannot be united with a count for trover for the taking of the tree.)]

[*Contra* also *Mosely vs. Moss*, 6 *Gratt. (Va.)*, 534. (Statutory action for insulting words, and common-law action for defamation, not joinable.)]

[*Compare Sipperly vs. Troy & Boston R. R. Co.*, 9 *How. Pr. (N. Y.)*, 83. (Complaint set aside for irregularity, because counting under railroad act for obstructing highways, and also under another statute for treble damages for the same obstruction.)]

The case of *McCoun vs. New York Cent. & H. R. R. Co.*, 50 *N. Y.*, 176, is examined in *Western Union Telegraph Co. vs. Taylor* (*Ga.*, 1890), 8 *L. R. A.*, 189, and the rule therein laid down,—that a statute liability wants all the elements of a contract, and that an action for a penalty is not an action “upon contract” within the meaning of the former *N. Y. Code* (*Code Pro.*, § 129) prescribing the form of summons,—was applied in construing constitutional provision in Georgia that the jurisdiction of justices’ courts be limited to civil cases arising *ex contractu*,—the Court holding that actions to recover a penalty imposed by statute could not by legislative enactment be placed within such jurisdiction. In the view of the Georgia court Blackstone’s extension of the term “contract” to obligations created or implied by law is too loose.

The weight of authority is that a judgment shown to have been recovered for tort is not to be deemed a contract. Whether other judgments can be considered as contracts, or if so, for what purposes, is not settled.

Taylor vs. Root, 4 *Abb. Ct. App. Dec.* 382; s. c., less fully, 4 *Keyes*, 335.

Black on Judgt., 11.

As to whether statutory duty is a contract, see note in 20 *Abb. N. C.*, 221.

In Massachusetts there are three classes of personal actions: (1) contract including former assumpsit, covenant, and debt, except for penalties; (2) tort, including former trespass on the case, trover, and all penalties; (3) replevin. "Any number of counts for different causes of action belonging to the same division of actions may be inserted in the same declaration," and contract and tort on same transaction in case of doubt.

* *Wiles vs. Suydam*, 64 *N. Y.*, 173. (Cause of action in respect of a corporate debt, against defendant as stockholder, capital not being paid in, and also as trustee for penalty for neglect to file annual report, *held* not joinable: they did not arise out of the same transaction; moreover the measure of liability, the proper defences, and the defendant's remedies over against third persons, are different.)

Compare *Bonnel vs. Wheeler*, 1 *Hun*, 332; 16 *Abb. Pr. N. S.*, 81; *Sterne vs. Herman*, 11 *Abb. Pr. N. S.*, 376; *Richards vs. Kinsley*, 12 *N. Y. State Rep.*, 125.

§ 422. *Legal and equitable*.—Under the New Procedure it is no objection to the uniting of two causes of action otherwise joinable that one is of a legal nature and the other of an equitable nature,¹ notwithstanding that they may require different modes of trial² or different kinds of relief.³

* First Div. St. P. & Pac. R. Co. *vs. Rice*, 25 *Minn.*, 278. (Several causes of action whether legal or equitable may be united in the same complaint, whenever they are all included in the same transaction or transactions connected with the subject of the action, provided they affect all the parties to the action and do not require different places of trial. There was therefore no misjoinder in this case. [Citing *Montgomery vs. McEwen*, 7 *Minn.*, 276 (351).])

Montgomery vs. McEwen, 7 *Minn.*, 351. (Plaintiff may unite with an action on note for the purchase money of real estate an action for the release and discharge of a mortgage on other property given by plaintiff to defendant in the same transaction to secure defendant against an incumbrance upon land sold. It is no objection in such case that one of the actions is legal and the other equitable.)

Farmers & Merchants' Nat. Bk. of Buff. *vs.* Rogers, 17 *N. Y. State Rep.*, 381; s. c., 15 *Civ. Pro. R.*, 250. (Cause of action on a promissory note, and one to foreclose plaintiff's lien upon pledge therefor. [Citing *Lattin vs. McCarty*, 41 *N. Y.*, 107; *Sternberger vs. McGovern*, 56 *id.*, 12.])

People vs. Metropolitan Telephone Co., 31 *Hum.*, 596, 598. (Code Civ. Pro., § 484, enabling a plaintiff to include in his complaint both a legal and an equitable cause of action, *held*, applicable to an action to restrain the completion of a telephone line, to remove its incomplete line as a nuisance, and to restore the street where it was located to its original condition.)

Compare Crites vs. Supervisors, 67 *Wis.*, 236. (A cause of action to have tax certificates on the sale of land for taxes set aside cannot be joined with one against the holders of such certificates to recover back money unnecessarily paid into court as a condition of relief, in an action brought by the holders of such certificates to bar the original owners (plaintiffs in this suit). One being in equity to cancel certificate, the other at law to recover back the money. [Citing *Leidersdorf vs. Second Ward Savings Bank*, 50 *id.*, 406.])

Under the Iowa Code, § 2630, permitting the joinder of causes only where each may be prosecuted in the same kind of proceedings, legal and equitable causes cannot be joined. *Stevens vs. Chance*, 47 *Iowa*, 602.

In *Arkansas* (§ 5026) the caption of the complaint must state whether the proceedings are at law or in equity.

In the following States the statutes expressly provide that causes of action whether legal or equitable may be joined if otherwise joinable :

Connecticut—*Practice Act, Gen. Stat.*, 1888, § 878; *Florida*—*McClellan's Dig. of Laws Fla.* (1881), c. 162, § 71 ("causes of action of whatever kind," but this does not include replevin or ejectment); *Kansas*—*Civ. Pro.*, § 83, *Gen. Stats.* (1889), ¶ 4166; *Minnesota*—*Gen. Stats.* 1878, c. 66, § 118 (Sec. 98); *Missouri*—*Rev. Stat. of 1889*, § 2040; *Nebraska*—*Code Civ. Pro.*, § 87; *New York*—*Code Civ. Pro.*, § 484; *Ohio*—*Rev. Stats.*, § 5019; *South Carolina*—*Rev. Stat.*, tit. v, c. 229, § 190; *Wisconsin*—*Rev. Stat.* (1889), § 2647.

In *Indiana*—*Civil Pro.* (1881), *Rev. Stat.* (1888), c. 2, §§ 278, 279, 280—and a number of other States the statutes by necessary implication establish the same rule.

¹ *Parmerter vs. Baker*, 24 *Abb. N. C.*, 104; s. c., 27 *State Rep.*, 635; 8 *N. Y. Supp.*, 69. (Holding that under *N. Y. Code Civ. Pro.*, as amended § 484, it is no objection to

joinder that the causes of action require different modes of trial if they do not require different places of trial.)

If they require different modes of trial, the Court can direct the order in which the several issues shall be tried. *Sturm vs. Atlantic Mut. Ins. Co.*, 38 *N. Y. Super. Ct. (J. & S.)*, 281.

* *Lattin vs. McCarty*, 41 *N. Y.*, 107.

§ 423. *Action to recover debt and enforce lien.*—A cause of action to recover a debt, and a cause of action to enforce a lien for its payment, may now be joined.

Parmeter vs. Baker, 24 *Abb. N. C.*, above cited. (Holding that the rule in *Burroughs vs. Tostevan*, 75 *N. Y.*, 567, 572, that an action to enforce a lien cannot be united with an action to recover a debt, except in case of a mortgage, is superseded by the *N. Y. Code of Civil Procedure* as amended in 1887.)

Jordan vs. Smith, 83 *Ala.*, 299; s. c., 3 *South. Rep.*, 703. (Action for judgment against husband and wife for price of supplies, and to enforce lien therefor on wife's separate estate.)

Witte vs. Wolfe, 16 *S. C.*, 256. (A cause of action for an unsecured demand arising on contract may be united with a cause of action for foreclosure of a mortgage. So held on exception to judge's findings in considering the action on contract.)

Stephen vs. Magor, 25 *Wisc.*, 533. (Personal judgment for price, and foreclosure of vendor's lien therefor.)

Sauer vs. Steinbauer, 14 *id.*, 71. (Foreclosure of mortgage, and personal judgment for deficiency.)

In *Indiana* and *Ohio* the statute allows the foreclosure of a lien and the recovery of the debt in the same action.

§ 424. *Incidental relief.*—A claim for specific relief incidental or preliminary to the relief or demand which is the main object of the suit may be joined when arising out of the same transaction.

Pfister vs. Dascey, 65 *Cal.*, 403. (Claims to annul and set aside as fraudulent certain conveyances, under the Code, to determine adverse claims to the real property involved, and ejectment for possession and rents and

profits, can be prosecuted in same action under our system. All of the matters complained of related to the same property, were parts of one transaction and one design to defraud, and affected all the parties who defended the action.)

Stock Growers' Bank vs. Newton, 13 *Colo.*, 245. (A judgment creditor was entitled to bring action for cancellation of fraudulent deed from judgment debtor and, as a matter of equitable relief, ask for a "recovery of possession of" property. They are not improperly united under Code, as they affect all parties in the same character and capacity, and are directly connected with subject-matter of litigation. [Citing *Pom. Rem.*, §§ 78, 79; *Lattin vs. McCarty*, 41 *N. Y.*, 107; *Henderson vs. Dickey*, 50 *Mo.*, 167; 1 *Story Eq. Jur.*, § 700; 3 *Pom. Eq. Jur.*, § 1377; *Swift vs. Arents*, 4 *Cal.*, 390; *Harrison vs. Kramer*, 3 *Iowa*, 543; *Hager vs. Schindler*, 29 *Cal.*, 47; *Gormly vs. Potter*, 29 *Ohio St.*, 597; *Frakes vs. Brown*, 2 *Blackf.*, 295; *Gallman vs. Perrie*, 47 *Miss.*, 140; *Allen vs. Writch*, 5 *Colo.*, 226; *Birdsall vs. Waggoner*, 4 *Colo.*, 256; *Orendorf vs. Budling*, 12 *Fed. Rep.*, 24.])

Scarborough vs. Smith, 18 *Kan.*, 399. (Causes of action for the recovery of real property; for rents and profits, and for partition may be united, as they all arise out of the "same transaction" or are connected with the "subject of the action," i.e. plaintiff's right to possess and enjoy the property.)

Akin vs. Davis, 11 *Kan.*, 580. (Action for injuries from overflow of a dam may be united with one for an injunction to restrain its maintenance.)

Blair vs. Chicago & Alton R. R. Co., 89 *Mo.*, 383. (A count in equity to set aside a release of damages for personal injuries may be united with one at law for the recovery of the damage.) [Citing *Henderson vs. Dickey*, 50 *Mo.*, 161.]

Stewart vs. Carter, 4 *Neb.*, 564. (Under the Code a petition to obtain the correction of an official bond and to recover a money judgment for the breach thereof may be joined. Both causes arise out of the same transaction or transactions connected with the subject of the action. [Citing *Globe Ins. Co. vs. Boyle*, 21 *Ohio St.*, 119; *Welles vs. Yates*, 44 *N. Y.*, 525.])

§ 425. *Same transaction or subject.*—It is the better opinion that under the usual provision in the codes, un-

less the statute clearly precludes it, claims of whatever nature which arise out of the same transaction, or transactions connected with the same subject of action, may be joined if they all affect the same parties and do not require different places of trial.

Polley vs. Wilkisson, 5 *Civ. Pro. R. (N. Y.)*, 135; s. p., *Heigle vs. Willis*, 50 *Hun*, 588.

[*Contra*, *Teall vs. City of Syracuse*, 32 *Hun*, 332; *Sullivan vs. N. Y. & N. H.*, etc., *R. R. Co.*, 61 *How. Pr.*, 490; *Raynor vs. Brennan*, 40 *Hun (N. Y.)*, 60.]

The New York statute enumerates in successive subdivisions the various kinds of causes of action that may be joined with each other, stating as the last subdivision claims not included within one of the foregoing subdivisions, provided they arise out of the same transaction or transactions connected with the same subject of action; and concludes with a proviso that all the claims joined must belong to one of the foregoing subdivisions.

This means (1) that claims not arising out of the same transaction or subject may be joined if they belong to the same class; (2) that claims which do arise out of the same transaction or subject, etc., may be joined notwithstanding they do not both belong to any one class of the previously enumerated causes. The provisions respectively allowing joinder of causes of action "arising out of the same transaction, or transactions connected with the same subject of action," and allowing counterclaim of a cause of action "arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action,"—mark the adoption of the general principle familiar in equity procedure, and were intended to extend that principle by allowing joinder of several equitable causes of action in one complaint in an equitable action; joinder in actions of a legal nature of causes of action which were sufficiently cognate to each other by reason of arising out of the same transaction or being connected with the same subject to have come within the rule as to equitable suits; and joinder of equitable with legal causes of action similarly related to each other; and to allow also the same test to apply to counterclaim in actions whether legal or equitable. If this view of the similar intention of the two provisions is sound, the ruling in *Cass vs. Higgenbotham*, 100

N. Y., 248, certainly turns the scale in favor of the rule stated in the text.)

§ 426. *Place and mode of trial*.—It is a misjoinder to unite causes that require different places of trial; but not to unite (where law and equity are merged) those that require different modes of trial.²

¹ *Connecticut—Practice Act, Gen. Stat.* 1888, § 878; *Indiana—Civil Pro.* (1881), *Rev. Stat.* (1888), c. 2, § 278 (106); *Minnesota—Gen. Stats.* 1878, c. 66, § 118 (Sec. 98); *Missouri—Rev. Stat. of* 1889, § 2040; *New York—Code Civ. Pro.*, § 484; *Ohio—Rev. Stats.*, § 5019; *Oregon—Stat.* (1887), 1 *Hill's Stat.*, § 93; *South Carolina—Rev. Stat.*, tit. v, c. 229, § 190.

² See note to § 423.

§ 427. *Inconsistency*.—It is the better opinion that the rule that inconsistent causes of action cannot be joined¹ refers to inconsistency in point of fact between essential allegations, and not to incongruity in legal theory, nor to the mere sufficiency of one, if established, to render the other superfluous.²

¹ *N. Y. Code Civ. Pro.*, § 484.

² See *Krower vs. Reynolds*, 99 *N. Y.*, 245, and cases collected in note in 24 *Abb. N. C.*, 326, on pleading several grounds of recovery.

§ 428. *Objection to jurisdiction only*.—Under a demurrer for misjoinder of causes of action, the objection that a cause of action of which the Court has no jurisdiction has been joined, is not available, if the causes would otherwise be joinable.

Cook vs. Chase, 3 *Duer (N. Y.)*, 643. (Cause of action affecting lands without the territorial limits of jurisdiction, joined with one within the jurisdiction.)
Dodge vs. Colby, 108 *N. Y.*, 445; s. c., 15 *N. East.*, 703; 11 *Cent.*, 466.

§ 429. *Avoiding by reason of insufficiency of one cause.*—A demurrer for misjoinder may be overruled if one cause of action is insufficient, and rejecting it excludes the misjoinder.¹

But it is not error to sustain the demurrer in such a case.²

Nor is it proper to overrule the demurrer if there remains a misjoinder of plaintiffs.³

¹ *Sullivan vs. New York, N. H. & H. R. Co. (U. S. Circ. Ct. N. Y.)*; 11 *Fed. Rep.*, 848; s. c., 19 *Blatchf.*, 388; 61 *How. Pr.*, 490. (Action under the Code.)

Newman vs. Smith, 77 *Cal.*, 22; s. c., 18 *Pac.*, 791. (Action under the Code.)

McCabe vs. Bellows, 1 *Allen (Mass.)*, 269. (Bill in equity.)

Berford vs. Barnes, 45 *Hun (N. Y.)*, 253. (Action under the Code.)

Jenkins vs. Thomason, 32 *S. C.*, 254; *New Home Sewing Machine Co. vs. Wray*, 28 *S. C.*, 86. (Action under the Code.)

Hiles vs. Johnson, 67 *Wisc.*, 517; s. c., 30 *North West. Rep.*, 721. (Action under the Code.)

² *Higgins vs. Crichton*, 11 *Daly (N. Y.)*, 114; s. c., 2 *Civ. Pro. R.*, 317; s. c., 2 *id. (McCarty)*, 78; and 63 *How. Pr.*, 354; *aff'd* in 98 *N. Y.*, 626.

s. p. *Flynn vs. Bailey*, 50 *Barb.*, 73.

³ *Walker vs. Powers*, 104 *U. S.*, 245, 249.

D. *Objections to Misjoinder of Causes of Action turning on the Involving of Claims affecting Different Parties; (including Multifariousness).*

§ 430. *Several parties,—at common law.*—At Common Law there is a misjoinder of causes of action if several are united where there are several parties, plaintiff or defendant, unless each cause of action is joint or joint and several, as to all the plaintiffs or defendants.

Brown vs. Lee (U. S. Dist. Ct. Miss.), 19 *Fed. Rep.*, 630. (Action against firm with count against one partner: latter count held bad on his demurrer. [Citing *Chitt.*

Pl. and Miller vs. Northern Bk. of Miss., 5 *Geo. (Miss.)*, 412.]

McMullen vs. Church, 82 *Va.*, 501; s. c., 11 *Va. L. J.*, 421.

(Action for malicious prosecution of attachments, some counts charging both defendants, others respectively charging each separately, etc. *Held*, bad. RICHMOND, J., said: "If several persons be made defendants jointly, where the tort *could not*, in point of law, be joint, they may demur; and if a verdict be taken against all, the judgment may be arrested or reversed on a writ of error; but the objection may be aided by the plaintiffs taking a verdict against one only, or, if several damages be assessed against each, by entering a *nolle prosequi* as to one after the verdict and before the judgment. So in other cases, where, in point of fact and of law, several persons *might have been jointly guilty of the same offence*, the joinder of more persons than were liable in a personal or mixed action in form *ex delicto* constitutes no objection to a partial recovery, and one of them may be acquitted and a verdict taken against the others. On the other hand, if several persons jointly commit a tort, the plaintiff in general has his election to sue all or some of the parties jointly, or one separately." But "in actions *by and against* several persons, whether *ex contractu* or *ex delicto*, all the causes of action must be stated to be joint. Thus a plaintiff cannot, in a declaration against two defendants, state that *one* of them assaulted him, and in another part that the other assaulted him, or took his goods, for the trespasses are of several natures and against several persons, and they cannot plead to this declaration. 1 *Chitt. Pl.*, 225."

§ 431. — *under New Procedure*.—Under the New Procedure there is a misjoinder of causes of action if several are united, unless all the parties, plaintiffs¹ and defendants,² are affected by each cause of action. This rule applies whether the causes of action are of a legal³ or an equitable⁴ nature, or of both.⁵

There is an exception in the case of foreclosure.

¹ *Bort vs. Yaw*, 46 *Iowa*, 323. (Two plaintiffs, each having a separate cause of action against a defendant, cannot unite them merely because they arise out of the same transaction.)

Taylor vs. Manhattan Ry. Co., 53 *Hun*, 305; s. c., 6 *N. Y. Supp.*, 488. (Wrong to firm, and wrong to single partner, cannot be joined.)

State ex rel. vs. Board of Comm'rs, 38 *Kans.*, 317. (Mandamus to review vote of different townships on bonding in aid of railroad. *Held*, that the case of each township must be presented as a separate cause of action.)

Mosier vs. Beale (*U. S. C. Ct. Cal., S. D.*, 1890), 43 *Fed. Rep.*, 358. (A complaint by husband and wife alleging injury to the wife and damage to both plaintiffs by reason thereof, misjoins causes of action, as the husband, though properly joined, cannot himself recover for injuries to the wife. [Citing *Matthew vs. Railroad Co.*, 63 *Cal.*, 451.])

* *Johnson vs. Kirby*, 65 *Cal.*, 482. (Action to obtain re-transfer of stock, part from each of two different defendants, who respectively obtained it by different frauds.)

Buell vs. Dodge, 79 *Cal.*, 208. (Cause of action against two persons separately uniting in an agreement to clear the title to land, the stipulations of each being distinct, not joinable.)

Doan vs. Holly, 25 *Mo.*, 357. (Improper to join a cause of action against two defendants with one against one of the defendants alone.)

Holeran vs. School Dist. No. 7, 10 *Neb.*, 406. (Action on two official bonds given by the same officer with different sureties.)

Trowbridge vs. Forepaugh, 14 *Minn.*, 133. (Cause of action against a city for injury caused by defect in street, and against the person who caused the defect in the street, not joinable.) s. p., *Kelly vs. Newman*, 62 *How. Pr. (N. Y.)*, 156.

[In *Bateman vs. Forty-second St., M. & St. N. Ave. Ry. Co.*, 5 *N. Y. Supp.*, 13, it was however held that an action against a municipality for injury resulting from its neglect to keep street in repair, and against a railway company who had agreed with the municipality to do so and neglected it, was maintainable and not demurrable as joining different causes of action.]

Pracht vs. Ritter, 48 *N. Y. Super. Ct.*, 509. (Action against two defendants for a deceit by both, and for a deceit by one of them.)

Hines vs. Jarrett, 26 *S. C.*, 480. (Action against one for erecting dam, and another, his grantee, for its continuance.)

Lull vs. Improvement Co., 19 *Wisc.*, 100. (Action for damages against A and B for respectively erecting,

separately, dams on different branches of the same stream, and thereby flowing plaintiff's lands, demurrable.)

Greene vs. Nunnemacher, 36 *Wisc.*, 50. (Successive tenants respectively maintaining the same nuisance.)

Hoffman vs. Wheelock, 62 *Wisc.*, 434. (A cause of action against an administrator and others growing out of the fraudulent sale of land by the administrator, not joinable with a cause of action against the administrator alone for waste committed prior to the sale.)

Gillingham vs. Delaware Div. Canal Co., 19 *W. N. C.*, 319. (Action for damages by the falling of a structure owned by one defendant and separately leased by the other. [Citing *Wright vs. Geer*, 6 *Vt.*, 151.])

Van Liew vs. Johnson, 6 *N. Y. Supm. Ct. (T. & C.)*, 648; mem., s. c., 4 *Hun*, 415. (Plaintiff alleged that defendant J. by fraud induced plaintiffs to assign to his son a claim they held against an insolvent estate of which J. and M. were the assignees for benefit of creditors; and that J. himself received the dividends thereon; and demanded as a relief that the assignment be cancelled, and that the assignees account. *Held*, a misjoinder of causes of action, because they affected different parties and arose out of different transactions.)

Suber vs. Allen, 13 *S. C.*, 317. (Creditor's action for an accounting of decedent's estate, and also impeaching a claim of title of a third person against certain lands.)

Turner vs. Duchman, 23 *Wisc.*, 500. (Action to quiet title by the holder of three tax deeds against several defendants who held in severalty where the former owners were different.)

De Caumont vs. Morgan, 21 *N. Y. Weekly Dig.*, 357; s. c., in full, *Daily Reg.*, June 30, 1885. (An action cannot be brought against two defendants charged with having obtained separate and distinct property from a testator by undue influence.)

Compare Reed vs. Howe, 28 *Iowa*, 250. (Action by heirs against administrators for an accounting, to set aside a fraudulent settlement, and to reach funds invested in real estate, may properly be joined with a cause of action to set aside an order of the county court for the sale of the real estate, and a fraudulent sale thereunder, both causes being equitable and the parties the same.)

Also Rank vs. Levinus, 50 *N. Y. Super. Ct.*, 159; s. c., 5 *Civ. Pro. R.*, 368. (Ejectment against several defendants, alleging that all were in possession; also that one was in possession of a part under the others. *Held*,

not a case for the application of rules that are to be applied to several pieces of land held separately.)

- ³ *Gray vs. Rothschild*, 112 *N. Y.*, 668, aff'g 48 *Hun*, 596; 14 *Civ. Pro. R.*, 320. (Separate vendors injured by one scheme of fraud cannot join in suing for damages merely.)

Thorpe vs. Dickey, 51 *Iowa*, 676. (An action on a note against a maker and an indorser cannot be joined with an action on an account against the indorser only.)

Cogswell vs. Murphy, 46 *Iowa*, 44. (Several owners of cattle not liable in a single action for trespass.) [But in Iowa the remedy for misjoinder of action seems to be motion to compel election, not demurrer. See statutes.]

Hoye vs. Raymond, 25 *Kan.*, 665. (Cause of action against constable and deputy for wrongful levy not joinable with action against constable's sureties on the bond for the same wrong, because both do not affect the same parties. [Citing *Waterbury vs. Westervelt*, 9 *N. Y.*, 598; *King vs. Orser*, 4 *Duer*, 431; *McIntyre vs. Trumbull*, 7 *Johns.*, 35; *Civ. Code*, § 83.]

Durein vs. Pontious, 34 *Kans.*, 353. (Joint action by children under civil damage act.)

- *Harsh vs. Morgan*, 1 *Kan.*, 293. (Suits of separate lienors under mechanics' lien law, and vendor's suit to enforce his lien, cannot be consolidated.)

Liney vs. Martin, 29 *Mo.*, 29. (Widow, to set aside conveyance in fraud of dower, and heir, to establish trust founded on the conveyance, cannot join.)

Barnes vs. City of Beloit, 19 *Wisc.*, 93. (Two or more owners in a city cannot unite in an action to restrain the sale of lots owned by them severally for taxes illegally assessed, or to prevent the execution of deeds for such lots upon such sale, but each must bring his several suit.)

[Compare with *Peck vs. School District*, 21 *Wisc.*, 516. (Holding that where the relief demanded consisted in part in having a contract entered into by the School District declared void, as to that the plaintiffs were properly joined.)]

- *Church vs. Stanton*, 9 *N. Y. State Rep.*, 121. (Complaint against all of the defendants for amount of receiver's certificates, and seeking to charge one of them with certain property in trust for the payment of the certificates.)

Howse vs. Moody, 14 *Fla.*, 59. (Creditors' action against an administrator to reach property of their debtor which had been fraudulently transferred to intestate, improv-

erly united with an action against sureties on the administrator's bond.)

Stanton vs. Missouri Pacific Ry. Co., 15 *Civ. Pro. R.*, 296; 2 *N. Y. Supp.*, 298. (A cause of action for equitable relief against a corporation cannot be united with a claim for damages against individual defendant.)

House vs. Cooper, 16 *How. Pr. (N. Y.)*, 292. (In an action for equitable relief against a corporation, a claim for damages against individual defendants cannot be joined.) [*Compare* 36 *N. Y.*, 569.]

Sortore vs. Scott, 6 *Lans. (N. Y.)*, 271. (A claim in the nature of a legal demand against a surviving trustee, for interest due under the will, cannot be joined in an action against him and the representative of the deceased trustee to have an accounting; but the accounting and repayment of money lost by the misconduct of the trustees may be joined.)

§ 432. *Equitable action—Co-plaintiffs.*—The general rule prevailing in Equity that it is not a misjoinder for parties having a joint or common interest in obtaining the same specific relief—such as an accounting—to join as co-plaintiffs, applies in actions of an equitable nature under the New Procedure.¹ The claims are regarded in such a case as a single cause of action, although the respective interests of the plaintiffs differ. Otherwise if the several claims are distinct or antagonistic.²

Shields vs. Thomas, 18 *How. (U. S.)*, 253.

Langdon vs. Branch (Cir. Ct. S. D. Ga.), 37 *Fed. Rep.*, 449. (In a bill for injunction, *held* that three creditors, each of whom severally loaned money to the president of a corporation for specified purposes, under pledges of portions of the profits, might join in a bill for an injunction to restrain a violation of such agreement.)

Plaintiffs claimed against a common trustee, and asserted that a joint wrong had been done them by the defendant, involving the trust property. *Held*, that where there is a common liability in the defendants and a common interest in the plaintiffs, different claims to property, at least if the subjects be such as may without inconvenience be joined, may be united in one and the same suit. *Bunuel vs. Stoddard (U. S. C. Ct. Ohio)*, 2 *Am. L. Rec.*, 145, 202.

* *Barham vs. Hostetter*, 67 *Cal.*, 272. (Action by separate land-owners for injunction and damages by diversion of water. *Held*, that the cause of action for injunction is common to them all. But for damage to their different parcels of land, the cause of action is not joint, but several. Demurrer sustained.)

Smith vs. Schulting, 14 *Hun* (*N. Y.*), 52. (Where plaintiffs have been induced by fraud to execute a joint release of their respective claims, the complaint is not demurrable for multifariousness, because in addition to the prayer to have the release set aside the plaintiffs ask for separate judgments for the amount due to them.)

Reed vs. Stryker, 4 *Abb. Ct. App. Dec.* (*N. Y.*), 26; rev'g 6 *Abb. Pr.*, 109. (In creditors' action several judgment creditors may join to set aside several fraudulent conveyances made to several different persons.)

s. p., *Suber vs. Allen*, 13 *S. C.*, 317.

[*Contra*, *Bobb vs. Bobb*, 8 *Mo. App.*, 257.]

Stallings vs. Barrett, 26 *S. C.*, 474. (Complaint by an adult and three minor wards for an accounting by their guardian of their undivided estate, who had given a single bond as such, is not a misjoinder of causes of action.)

Walker vs. Powers, 104 *U. S.*, 245. (In an action by creditor to set aside a fraudulent conveyance, a person claiming title to premises upon which the fraudulent conveyance is a cloud cannot join as plaintiff, as the complainants set up antagonistic causes of action, and the relief for which they respectively pray in regard to a portion of the property sought to be reached involves totally distinct questions, requiring different evidence and leading to different decrees.)

Stebbins vs. St. Anne, 116 *U. S.*, 386. (Two alternative claims, each belonging to many persons, one of whom has no interest in one claim, and others of whom have no interest in the other claim, cannot be joined in one bill in equity.)

§ 433. *Co-defendants in Equity—Multifariousness.*—

In Equity a suit can be brought as one cause against several defendants although the rights, interests, and liabilities of the several defendants as to each other be wholly separate and independent, if they are all connected with the subject-matter in such manner that the presence of

each is necessary or proper in order to grant a single entire measure of relief to the plaintiff.¹

But if a claim is joined for the purpose of determining a matter disconnected from the main object of the suit, the bill may be objected to as multifarious.²

The objection of multifariousness rests not on a rule of law, but on the discretion of the Court, in view of convenient administration of justice; and the following rules commonly guide that discretion:

1. A suit is not multifarious if the case against one is so entire as to require a single suit, although another defendant may be a necessary party in respect only to a part of the case.³

2. It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it is enough that each has an interest in some material matters in the suit, and they are connected with the others.⁴

3. A suit is not multifarious by reason of containing different causes against the same person, unless the grounds of suit are different and each ground as stated is sufficient to sustain a suit.⁵

The objection of multifariousness goes to the whole bill, and if distinct claims against different defendants are united, any one or all of such defendants may object.⁶

¹ *Brinkerhoff vs. Brown*, 6 *Johns. Ch. (N. Y.)*, 139. (Leading case in chancery. Holding that if the object of a suit is to reach the entire assets, whether of an individual, a partnership, or a corporation, which have been dispersed by fraudulent diversions, with the coöperation of various other persons, all the transactions forming a connected series of acts in which all the defendants were more or less concerned, though not jointly in each act, it presents but one cause of action.)

Graves vs. Corbin, 132 *U. S.*, 571, 587; s. c., 33 *Law. ed.*, 467. (Approving *Brinkerhoff vs. Brown*, above cited, and holding that there was not a separable controversy, under the Removal Act.)

Putnam vs. Sweet, 1 *Chand. (Wis.)*, 286, 332. (Stockholder's action against usurping officers of corporation and others. *Held*, that privity in interest on the part of the defendants was not necessary; for parties acting in hostility to each other may yet be joined if their acts in combination produce a grievance.)

Potts vs. Hahn (D. C. D. N. J.), 32 *Fed. Rep.*, 660. (Bill by assignee in bankruptcy to set aside a mortgage to one defendant, a conveyance to another, and a bill of sale to a third. Holding it not necessary to show that one defendant had anything to do with the other parts of the scheme.)

Fiery vs. Emmert, 36 *Md.*, 464. The Court say: "In order to sustain a demurrer to a bill in equity on the ground of multifariousness, it should either appear that several matters perfectly distinct and independent are joined in the bill against the same defendant, thus compelling him to unite in his answer different matters wholly unconnected with each other, or that the bill contains the demand of several matters, of a distinct and independent nature, against several defendants, thus imposing upon each of these the costs incident to the trial of several claims against the other defendants, with which he has no connection and in which he has no interest. Hence the objection should be confined to cases in which the demand against each particular defendant is entirely distinct and separate in its subject-matter from that in which other defendants are interested, and does not apply where there is a common liability in the defendants, and a common although not coextensive interest in the complaints."

* *Washington City Savings Bank vs. Thornton*, 83 *Va.*, 157, 165; 2 *South East. Rep.*, 193. (Bill filed to obtain personal decree against one of the defendants as endorser of notes; to obtain like decree against him by way of damages for breach of warranty; to quiet title to part of the land as to the other defendants, and to sell the same to pay the notes; and to restrain defendants from cutting timber on the land. *Held*, multifarious. The Court say that it is well settled that a bill in equity is demurrable in which are united several distinct rights, each sufficient to sustain a bill against one defendant, or in which there is a demand of several distinct matters against several defendants, who are unconnected in interest or liability.)

Belt vs. Bowie, 65 *Md.*, 350; s. c., 4 *Atlantic Rep.*, 295. (Where a bill prays for relief in respect to two distinct

matters,—e.g., partition, and the enforcement of a mortgage claim against the estate,—it is multifarious.)

- * *Brown vs. Guarantee Trust Co.*, 128 *U. S.*, 403. (Foreclosure joining claim that original grantor be decreed to make specific performance so that mortgage shall be a first lien.)

United States vs. Am. Bell Tel. Co., 128 *U. S.*, 315. (Several patents, one of which might be sustained although the other might not.)

Middletown Savings Bank vs. Bacharach, 46 *Conn.*, 513. (Bill for foreclosure, removal of a cloud upon plaintiff's title by reason of a tax sale, and for possession of the mortgaged premises. *Held*, the leading object of the bill was the foreclosure of the mortgage, and that it was not multifarious because it asked incidental relief against some of the defendants and not against all.)

Followed in *De Wolf vs. Sprague M'fg Co.*, 49 *Conn.*, 282.

Attorney-General vs. Poole, 4 *Mylne & C.*, 17, 31; *Attorney-General vs. Cradock*, 3 *id.*, 85; *Turner vs. Robinson*, 1 *Simons & Stu.*, 313.

- * *Brown vs. Guarantee Trust Co.* (above cited).

Addison vs. Walker, 4 *Yo. & Col. Ch.*, 442; *Parr vs. Attorney-General*, 8 *Cl. & Fin.*, 435; *Worthy vs. Johnson*, 8 *Ga.*, 238.

Gaines vs. Chew, 2 *How. (U. S.)*, 619. (A bill filed to set aside a will which has been admitted to probate, and to establish another which it is alleged has been fraudulently suppressed; for an account to be required from the executor under the first will, of all the real and personal property which came to his hands, a portion of which, it is charged, was, by a combination with various persons, fraudulently appropriated; and for a delivery of the possession of all lands which belonged to the testator at the time of his death, and account of the rents and profits; and which makes parties defendants the executor and all persons who, by purchase or otherwise, have come to the possession of any property, real or personal, belonging to the testator at the time of his death, is not multifarious. It avoids a multiplicity of suits, and provides for the investigation of facts, in which all the defendants are interested, without subjecting them to unnecessary inconvenience and expense.)

s. P., *Gaines vs. Mausseaux (U. S. Circ. Ct. La.)*, 1 *Woods*, 118.

Oliver vs. Piatt, 3 *How. (U. S.)*, 333, 411; aff'g 3 *McLean*, 27. (A bill which embraces the distinct claims of

several parties is not open to the objection of multifariousness, if the interests of all are so mingled in a series of complicated transactions, that entire justice could not be conveniently obtained in separate and independent suits.)

* *Brown vs. Guarantee Trust Co.*, 128 *U. S.*, 403.

Bedsole vs. Monroe, 5 *Iredell Eq.*, 313; *Larkins vs. Bidle*, 21 *Ala.*, 252; *Nail vs. Mobley*, 9 *Ga.*, 278; *Robinson vs. Cross*, 22 *Conn.*, 171.

* *Boyd vs. Hoyt*, 5 *Paige Ch. (N. Y.)*, 79. (The Court say: "The form and effect of a demurrer to a bill in chancery for multifariousness is substantially the same as a demurrer to a declaration at law for a misjoinder of actions, or of different causes of action which cannot be properly litigated in the same suit. The demurrer in either case goes to the whole bill or declaration.")

[See *Gibbs vs. Clagget*, 2 *Gill & John.*, 29; *Johnson vs. Anthony*, 2 *Molloy Rep.*, 373. And where a joint claim against two defendants is improperly joined in the same bill with a separate claim against one of the defendants only, either or both of the defendants may demur for multifariousness. (*Ward vs. Duke of Northumberland*, 2 *Anst. Rep.*, 469.)]

Swift vs. Eckford, 6 *Paige*, 22 (to same effect).

McIntosh vs. Alexander, 16 *Ala.*, 87. (Bill alleged that defendants had conspired to remove certain slaves, in which complainants had a residuary interest, beyond complainants' reach, and that one of the defendants, A, had covenanted to deliver to one of the complainants certain of the slaves. *Held*, that a demurrer for multifariousness by A. was properly sustained, and that it was proper for the chancellor to dismiss the whole bill at the final hearing, although a decree *pro confesso* had been against the defendants not demurring. The Court here say: "The general rule is that a demurrer for multifariousness, like a demurrer for a misjoinder at law, goes to the whole bill; and if sustained, the bill should be dismissed, and ought not to be made the foundation of partial relief.")

Dunn vs. Cooper, 3 *Md. Ch.*, 46. (After receiver appointed on a creditor's bill to set aside fraudulent conveyances, an amended bill was filed attacking other conveyances of the same grantor, and asking that the receiver might be ordered to sell certain property that was in danger of being lost. *Held*, that a demurrer for multifariousness to the amended bill by two of the parties to the original bill and by one to the amended

bill, should be overruled, as it was necessary, if the demurrer was sustained, to dismiss the bill in toto, which under the circumstances of the case would be inconvenient. [Citing *Gibbs vs. Claggert*, 2 *G. & J.*, 29; *White vs. White*, 5 *Gill.*, 376.]

Butts vs. Genung, 5 *Paige* (N. Y.), 253. (Under N. Y. R. S. a creditor of decedent cannot file a bill against his heirs and personal representatives to obtain satisfaction of a debt out of the real and personal estate, and such a misjoinder renders the bill multifarious. Separate demurrers by administrator and heirs should have been sustained and bill dismissed.)

Contra, *Buerk vs. Imhaeuser*, 8 *Fed. Rep.*, 457, where the Court remarks that, as the defendant demurring is in no worse position by reason of the uniting of the matters in one suit, his demurrer for multifariousness must be overruled.

s. p., *Hill vs. Bonaffen*, 2 *W. N. C. (Pa.)*, 356; *Atnill vs. Ferrett*, 2 *Blatchf. C. Ct.*, 39, 44.

[*Compare* *Bermes vs. Frick*, 38 *N. J. Eq.*, 88. (A bill by one surety against three others to compel contribution alleged that two of the defendants had fraudulently conveyed their property in order to avoid contributing. *Held*, that the defendant not affected by such allegations was not required to answer them, and could not set up therefore that the bill was multifarious as to the other two.)]

§ 434. — *Co-defendants under the New Procedure.*— Under the New Procedure, claims affecting several defendants, such as might have been brought within the compass of a single suit in equity, are regarded as one cause of action; and in such actions, therefore, the equitable rules as to the joinder of parties defendant are still applicable.

Reed vs. Stryker, 12 *Abb. Pr. (N. Y.)*, 47. (Creditors' suit; following under the Code the rule in *Brinckerhoff vs. Brown*, § 433, n. 1.)

Turner vs. Conant, 18 *Abb. N. C. (N. Y.)*, 160; s. c., 10 *Civ. Pro. R.*, 192. (Action by claimant of corporation bonds against a company to compel delivery, and against an adverse claimant holding a certificate, not misjoinder, for the delivery of the bonds was one cause of

action, and cancelling the certificate outstanding merely auxiliary.)

[*Compare with* Day vs. Bank of State of N. Y., 52 *N. Y. Super. Ct. (J. & S.)*, 363; s. c., 9 *Civ. Pro.*, 51. (Claimant of stock under somewhat similar circumstances. *Held*, that the claim against the corporation and that against the wrongful holder of the outstanding certificate were distinct causes of action, and could not be joined where the complaint did not aver that the corporation had transferred or had threatened to transfer on its books the shares to the wrongful holder of the certificate.)]

Bradner vs. Holland, 33 *Hun (N. Y.)*, 288. (A creditor holding a joint judgment against debtors entitled to separate legacies under the same will may properly join them as defendants in one action to reach such property.)

Garner vs. Harmony Mills, 6 *Abb. N. C. (N. Y.)*, 212; s. c., less fully, 45 *Super. Ct. (J. & S.)*, 148. (Although all the defendants be not jointly connected in every act of a breach of trust alleged in the complaint, yet if there are a series of acts on their part produced by the same fraudulent intent, which contributed to the injury of the plaintiffs, and the statements are not made as separate and distinct causes of action against the several defendants, and a cause of action is alleged by which they are all affected and in respect to which they are necessary parties, the several matters may be joined in one complaint.)

Holmes vs. Abbott, 53 *Hun (N. Y.)*, 617; s. c., 6 *N. Y. Supp.*, 943. (Committee of a lunatic may sue to ascertain the lunatic's interest in the property, and the amount of liens thereon, although different defendants claim separate liens; for the property is the "subject of the action.")

s. p., Mahler vs. Schmidt, 43 *Hun*, 514. (HAIGHT, J., says that the provision of the Code allowing joinder, if it "appear upon the face of the complaint that all the causes of action so united are consistent with each other, and that they affect all of the parties to the action, is but declaratory of the rule that previously existed, and the test is whether or not the parties joined in the suit have one connected interest centring in the point in issue in the cause, or one common point of litigation. If so, unconnected parties may be joined, even where different relief is sought against them; but if the action is against different persons concerning things of distinct natures, in which some of the parties

have no interest, then the action cannot be joined."
[Citing *Fellows vs. Fellows*, 4 *Cow.*, 682.]

Jones vs. Morrison, 31 *Minn.*, 140. (Where the object of the action was to protect a stockholder from a contemplated conspiracy, it was held no objection to joinder of several defendants that their respective acts were done at different times, and all the defendants were not benefited by all of the acts, or not in the same degree.)

§ 435. *Different capacities*.—Where the same person is a party in several capacities, there is a misjoinder if each cause of action does not affect him in all such capacities, whether he is plaintiff¹ or defendant.²

¹ *Brown vs. Webber*, 60 *Mass.* (6 *Cush.*), 560. (A count on a promise to the plaintiff individually cannot be joined with a count on a promise to an intestate of whom plaintiff is administrator.)

Mertens vs. Loewenberg, 69 *Mo.*, 208. (A personal action cannot be united with one brought in a representative capacity.)

Dannaher vs. City of Brooklyn, 4 *Civ. Pro. R. (N. Y.)*, 286. (Plaintiff cannot unite a cause of action for negligence, causing death of one person of whose estate he is the administrator, with a cause of action for the death of another person of whose estate he is also administrator.) [Citing *Lucas vs. N. Y. Central R. R. Co.*, 21 *Barb.*, 245.]

Stanton vs. Missouri Pac. Ry. Co., 15 *N. Y. Civ. Pro. R.*, 296; 2 *N. Y. Supp.*, 298. (A cause of action in favor of plaintiff as an individual cannot be properly united with a cause of action in plaintiff's favor as a stockholder of a corporation, and therefore representing the corporation.)

[But plaintiff's demand as a surviving partner, being an individual right, may be joined with another individual demand not connected with the partnership. *McCartney vs. Hubbell*, 52 *Wisc.*, 360.]

So also, as being in the same capacity, plaintiff may unite an indebtedness arising on a contract with her *as* administratrix with an indebtedness arising on a contract with her intestate. *Valleau vs. Cahill*, 1 *N. Y. City Ct.*, 47. [Citing *Bogert vs. Hertell*, 4 *Hill*, 505; *Wells vs. Webster*, 9 *How. Pr.*, 251; *Fry vs. Evans*, 8 *Wend.*, 530.]

[But see *Ferrin v. Myrick* in next note.]

Compare cases cited in note 1, § 400.

² *St. Joseph's Orphan Society vs. Wolpert*, 80 *Ky.*, 86. (Demands against common guardian for maintenance of several infants;—separate causes of action not joinable.)

French vs. Salter, 17 *Hun (N. Y.)*, 546. (A cause of action against the trustee of an insolvent savings bank to recover money lost or wasted by illegal investments cannot be united with an action on his personal bond given to make up his deficiencies in the bank's assets. [Citing *Mappier vs. Mortimer*, 11 *Abb. Pr. N. S. (N. Y.)*, 458; *Clark vs. Coles*, 50 *How. Pr.*, 178; *Wiles vs. Suydam*, 64 *N. Y.*, 173.]

Paulsen vs. Van Steenbergh, 65 *How. Pr. (N. Y.)*, 342. (A complaint against a person as president of a corporation, which demanded an accounting by the defendant in his official capacity as to the property of the corporation and as to plaintiff's property,—*held*, demurrable.)

Weeks vs. Cornwell (N. Y.), 39 *Hun*, 643; s. c., 9 *Civ. Pro.*, 28. (A common trustee of several distinct trusts under a will, in favor of several different *cestui que* trustents, cannot join in one complaint several causes of action for an accounting and settlement of the different trusts.)

Price vs. Brown, 10 *Abb. N. C. (N. Y.)*, 67. (Causes of action arising out of a breach of trust by a testator, united in an action against his executor, brought by the surviving trustee, not a misjoinder of causes of action.)

Ferrin vs. Myrick, 41 *N. Y.*, 315. (A cause of action upon a contract with testator in his lifetime, cannot be united with one upon a contract made by his personal representative.) [See *Valleau v. Cahill* in last note.]

Compare Day vs. Stone, 15 *Abb. Pr. N. S. (N. Y.)*, 137; s. c., 5 *Daly*, 353. (In an action against the administrator of a deceased agent to compel an accounting, etc., plaintiff may ask judgment against the administrator individually for the payment of moneys and the delivery of books and specific property belonging to plaintiff which came to the deceased as such agent, and which defendant has possession of and refuses to deliver. This is not joining two causes of action.)

But in States where such representative is liable in his representative capacity both as to an action against the estate arising before the decedent's death and one arising on a contract by him as such representative, such actions may be joined. *Howard vs. Powers*, 6 *Ohio*, 92.

Hapgood vs. Houghton, 27 *Mass. (10 Pick.)*, 154.

See *N. Y. Code Civ. Pro.*, § 1815, which is as follows:

"An action may be brought against an executor or

or administrator personally and also in his representative capacity where the complaint sets forth a cause of action in both capacities and states facts which render it uncertain in which capacity the cause of action exists against him, or where the complaint sets forth two or more causes of action growing out of the same transaction or connected with the same subject of action."

By the statute of Colorado, claims joined must affect all the parties "in the same character and capacity;" but doubtless this nevertheless allows joinder of one person in both capacities.

§ 436. *Allegation of two capacities, and cause of action in one.*—A cause of action is not demurrable for misjoinder because it designates the defendant as sued individually and also in a representative capacity, if it shows a cause of action against him in either capacity.

Berford vs. Barnes, 45 *Hun* (N. Y.), 253. (Holding that as the complaint showed only a cause of action against defendant individually, the designation of him in a representative capacity might be disregarded as surplusage.)

[*Compare Carter vs. Ingraham*, 43 *Ala.*, 78. (Creditors' bill against heirs, etc., of deceased debtor. Defendant C. was served with summons as executor and also as heir-at-law, but the bill prayed process against him only in the latter character, and he answered the bill only personally, as heir-at-law, and not as executor. *Held*, a decree against him as executor is erroneous, as the register, in issuing the summons, had no right to go outside the prayer of the bill, and the answer did not waive it, as he only answered personally.)]

3. MISJOINDER OF PARTIES.

§ 438. *Presence of improper party.*—In the absence of statute sanctioning such a demurrer, a demurrer assigning as ground the misjoinder of an improper plaintiff, or an improper defendant, is not sustainable.

People ex rel. Lord vs. Crooks, 53 *N. Y.*, 648, and *cas. cit.*; *Paulson vs. Portland*, 16 *Oreg.*, 450; s. c., 1 *L. R. A.*, 673; 19 *Pacif. Rep.*, 450.

s. P., *Morningstar vs. Cunningham*, 110 *Ind.*, 328; s. c., 9 *West. Rep.*, 59.

[The objection should be for insufficiency as to that plaintiff, or for misjoinder of causes of action, as the case may require.]

[The present N. Y. Code allows demurrer for misjoinder of plaintiffs. But compare *Keyes vs. Little York Mining, etc., Co.*, 53 *Cal.*, 724; s. c., 9 *Reporter*, 78 (joint action against several miners for injunction against allowing débris to be washed on to plaintiff's land); with *Redelsheimer vs. Miller*, 107 *Ind.*, 485; s. c., 5 *West. Rep.*, 619; 8 *North East.*, 447.]

§ 439. *Co-plaintiffs not jointly interested*.—Two parties to the same contract, having separate but common interests may unite in bringing an action thereon.

Winne vs. Niagara Fire Ins. Co., 91 *N. Y.*, 185, 192. (Holding, on appeal from judgment, that the mortgagor and mortgagee could unite in one action on a policy containing the clause, "Loss, if any, payable to B. [the mortgagee] to the extent of his mortgage interest therein." *ANDREWS, J.*, said: "It is, we think, quite appropriate, and in accord with the flexible rule of procedure now applied in courts of justice, to allow persons situated as are the plaintiffs to unite in maintaining the action, and the practice is sanctioned by the language of the Code and of adjudged cases." [*Citing N. Y. Code Civ. Pro.*, § 466; *Boynton vs. Clinton, etc., Ins. Co.*, 16 *Barb.*, 254; *Ennis vs. Harmony F. Ins. Co.*, 3 *Bosw.*, 516; *Lasher vs. North Western Ins. Co.*, 18 *Hun*, 101.]

[For other cases on the familiar rule as to joint obligees, see *Sorsbie vs. Park*, 12 *Mees. & W.*, 146; *Hopkinson vs. Lee*, 6 *Q. B.*, 964; *Haddon vs. Ayres*, 1 *E. & E.*, 118; *Corey vs. Rice*, 4 *Lans. (N. Y.)*, 141; *Treat Lumber Co. vs. Warner*, 60 *Wisc.*, 183; s. c., 1 *Abb. New Pr. & F.*, 65 (bonds); *id.* 470 (undertakings).]

So parties separately affected by the same wrong may sue in equity for single relief by one injunction, but not for separate damages. *Murray vs. Hay*, 1 *Barb. Ch. (N. Y.)*, 59.

§ 440. *Separate relief*.—If several plaintiffs, properly joining for single relief common to all, claim also separate

relief peculiar to particular ones, the latter demand does not render the complaint bad for misjoinder, but should be disregarded or struck out.

Berolzheimer vs. Strauss, 51 *N. Y. Super. Ct. (J. & S.)*, 96; *s. c.*, 7 *N. Y. Civ. Pro. R.*, 225.

Murray vs. Hay, 1 *Barb. Ch. (N. Y.)*, 59.

§ 441. *Persons severally liable on the same instrument.*

—Under the statute allowing all or any of the persons liable upon the same written instrument to be joined as defendants,¹ it is not necessary that their liability be joint,² nor dependent on precisely the same conditions. Thus if the party of the third part in the instrument is liable only in case of default by the party of the second part,³ or if one expressly signs only as security for the other,⁴ they may be joined notwithstanding an additional fact may be necessary to be proved as against the latter.

But it is necessary that they should be liable upon the same instrument; and a separate guaranty, though written on the same paper is not the same instrument within the rule.⁵

If liable upon separate instruments, a demurrer by either for misjoinder of causes of action is sustainable.⁶

¹ For the form of this statute in N. Y. see *N. Y. Code Civ. Pro.*, § 454, modified from the former *Code Pro.*, § 120.

A similar statute has been adopted in Colorado, Florida, Minnesota, Nebraska, North Carolina, Oregon, South Carolina, and Wisconsin; and, in a modified form, in Arkansas, California, Iowa, Kentucky, Missouri, and Nevada. As to Tennessee, see *McMinn Academy vs. Reneau*, 2 *Swan*, 94.

² *Costigan vs. Lunt*, 104 *Mass.*, 217. (Holding that separate judgments may be remedied.)

Colt vs. Learned, 118 *Mass.*, 380. (Holding that if the obligations are distinct, they should be stated in different counts.)

Estate of Britton, 15 *N. Y. State Rep.*, 445. *N. Y. Code Pro.*, § 120, abrogated the common law that persons sev-

erally liable could not be united in the same action, and permitted such joinder, though such person could be held jointly liable. [Citing *Alfred vs. Watkins*, 1 *Code Rep. N. S.*, 343; *Brainard vs. Jones*, 11 *How. Pr.*, 569; *Strong vs. Wheaton*, 38 *Barb.*, 616; *Cridler vs. Curry*, 44 *How. Pr.* 345; *Field vs. Van Cott*, 15 *Abb. Pr. N. S.*, 349; s. c., 5 *Daly*, 308.]

* *Carman vs. Plass*, 23 *N. Y.*, 286.

Viadero vs. Morton, 6 *N. Y. Civ. Pro. R.*, 238. (Action against the sureties on a bond given by an auctioneer to the mayor of N. Y., on the granting of a license to him, the auctioneer not being made a party. [Following *Field vs. Van Cott*, 5 *Daly*, 308.]

See also *Wibaux vs. Grinnell Live Stock Co.* (*Mont.*, 1889), 22 *Pacif. Rep.*, 492.

Keyser vs. Fendall, 5 *Mackey (D. C.)*, 47; s. c., 3 *Cent. Rep.*, 515.

* *Decker vs. Gaylord*, 8 *Hun (N. Y.)*, 110.

* *Tibbits vs. Percy*, 24 *Barb. (N. Y.)*, 39.

[*Contra*, *Kautzman vs. Weirich*, 26 *Ohio St.*, 330. (Guaranty indorsed by payee upon note.) s. p., *Gagan vs. Stevens*, 4 *Utah*, 348.]

* *Barton vs. Speis*, 5 *Hun (N. Y.)*, 60. [So far as this case holds that demurrer does not lie if there is but one statement of the cause of action, it is overruled.]

XII. DEMURRER FOR DEFECT OF PARTIES.

§ 442. Form of demurrer.

443. What is a defect.

444. Who may demur—in absence of merely “necessary” party.

§ 445. — absence of “indispensable” party.

446. Excuse for non-joinder.

447. Presumption that needed party is living.

§ 442. *Form of demurrer.*—In Equity¹ and under the New Procedure² a demurrer for defect of parties must point out the omitted party either by name or by such a description as to inform the plaintiff who is intended.

* *Stor. Eq. Pl.*, 501, § 543; *Dias vs. Bouchaud*, 10 *Paige*, 445; *Robinson vs. Smith*, 3 *id.*, 222; *Dwight vs. Central Vt. R. Co. (Circ., Vt.)*, 9 *Fed. Rep.*, 785; s. c., 20 *Blatchf.*, 200.

* *Baker vs. Hawkins*, 29 *Wisc.*, 576.

Skinner vs. Stuart, 13 *Abb. Pr. (N. Y.)*, 442. (A demurrer using only the words of the Code, that there is a defect of parties defendant, is insufficient.)

§ 443. *What is a defect.*—The defect of parties for which demurrer is allowed, under the New Procedure, is only a deficiency and not an excess of parties either plaintiff¹ or defendant.²

¹ *Peabody vs. Washington County Mutual Ins. Co.*, 20 *Barb. (N. Y.)*, 339; *Gregory vs. Oaksmith*, 12 *How. Pr.*, 134; *People vs. Mayor, etc., of N. Y.*, 28 *Barb.*, 240; s. c., 8 *Abb. Pr.*, 7.

Lowry vs. Jackson, 27 *S. C.*, 318, 321.

² *Hill vs. Marsh*, 46 *Ind.*, 218.

N. Y. & New Haven R. Co., vs. Schuyler, 7 *Abb. Pr. (N. Y.)*, 41; s. c., less fully, 17 *N. Y.*, 592; *Allen vs. City of Buffalo*, 38 *N. Y.*, 280; *Churchill vs. Trapp*, 3 *Abb. Pr.*, 306; *Richtmyer vs. Richtmyer*, 50 *Barb. (N. Y.)*, 55; *Pinckney vs. Wallace*, 1 *id.*, 82.

Neil vs. Ohio Agric., etc., College, 31 *Ohio St.*, 15.

Great Western Compound Co. vs. Aetna Ins. Co., 40 *Wisc.*, 373.

It is the same as non-joinder of a necessary party, in an action at law, under the superseded system, or the omission of a necessary party in a suit in equity. *Palmer vs. Davis*, 28 *N. Y.*, 242; s. p., *Daby vs. Betts*, 16 *Abb. Pr. (N. Y.)*, 466, note; s. c., as *Davy vs. Betts*, 23 *How. Pr.*, 396; *Kolls vs. De Leyer*, 17 *Abb. Pr.*, 312; s. c., 41 *Barb.*, 208; 26 *How. Pr.*, 468.

§ 444. *Who may demur,—for absence of merely "necessary" party.*—If the controversy presented by the complaint appears on the face thereof to be such that it can be determined without prejudice to a person not joined who would be a proper party, but whose presence is not indispensable for his own protection, but necessary only for the protection of those who are made parties or some of them, or that it can be determined by expressly saving his rights, a demurrer for defect of parties for not joining him cannot be sustained, unless

interposed by a defendant who is or may be prejudiced by the non-joinder.

Newbould vs. Warrin, 14 *Abb. Pr.* (N. Y.), 80. (Action to reach property conveyed in fraud of creditors. *Held*, that defendants could not demur merely because it appeared that other property of the debtor had been fraudulently conveyed to persons who had not been made parties.)

Anderton vs. Wolf, 41 *Hun* (N. Y.), 571; s. c., 4 *State Rep.*, 101. (Stockholder's action against officers to prevent waste of corporate property. *Held*, defendants could not demur merely because all the directors had not been made parties.)

s. p., *Bradt vs. Church*, 110 N. Y., 537; aff'g 39 *Hun*, 262.

Dart vs. Palmer, 1 *Barb. Ch.* (N. Y.), 92. (Where the case made by the bill entitles complainant to particular relief against defendant, and would entitle him to further relief also if necessary parties were before the Court, and the prayer specifically asks for the more extended relief, to which he is not entitled in consequence of defect of parties, defendant may properly demur to the whole bill, for their absence.)

§ 445. — *for absence of "indispensable" party.*—If the controversy presented by the complaint appears on the face thereof to be such that it cannot be determined without prejudice to a person not made a party, or by saving his rights, he is deemed an *indispensable* party; and a demurrer for defect of parties in not joining him may be interposed by any defendant.

Sanders vs. Village of Yonkers, 63 N. Y., 489. (Action against a village to have an assessment declared void and to restrain defendant from executing a lease to purchaser at tax sale. *Held*, that defendant might demur for absence of the purchaser.)

Turner vs. Conant, 18 *Abb. N. C.* (N. Y.), 160; s. c., 10 *Civ. Pro. R.*, 192. (Person claiming an interest adverse to plaintiff necessary; because defendant was entitled to protection against both.)

Moore vs. Hegeman, 6 *Hun* (N. Y.), 290. (Suit to have trust in a will declared void. *Held*, that defendant

might demur for omission to join persons interested in sustaining the trust.)

Inman vs. Corwin, 9 *N. Y. Supp.*, 195.

Graham vs. Minneapolis (*Minn.*, 1889), 42 *N. W.*, 291.

(Third person shown by the complaint to be owner of the cause of action.)

§ 446. *Excuse for non-joinder*.—It is the better opinion that a general allegation that one who appears on the face of the pleading to be an indispensable or a necessary party has no interest, without stating particulars, is not sufficient on demurrer, because it is a mere conclusion, and contrary to the facts stated; but that a general allegation, without particulars, that his interest has ceased, is sufficient on demurrer, as being an allegation of fact.

Compare *Farni vs. Tesson*, 1 *Black*, 309; *Coster vs. N. Y. & Erie R. Co.*, 3 *Abb. Pr. (N. Y.)*, 332; s. c., 6 *Duer*, 43; *Gilham vs. Cairnes*, 1 *Ill. (Breese)*, 164; *Great West. Comp. Co. vs. Ins. Co.*, 40 *Wisc.*, 373; *Kellar vs. Carr* (*Ind.*, May, 1889), 21 *North East. Rep.*, 463.

§ 447. *Presumption that needed party is living*.—A defect of parties is deemed to appear on the face of the complaint although the complaint does not show that the needed party is living.¹

If, however, death is alleged, a demurrer for not joining the executor or administrator of deceased will not lie, if there are no allegations to show that one has been appointed;² unless the case be such that some representative of the deceased is an indispensable party.

¹ *Porter vs. Fletcher*, 25 *Minn.*, 493.

Zabriskie vs. Smith, 13 *N. Y.*, 322; followed in *Eaton vs. Balcom*, 33 *How. Pr.*, 80, and in effect overruling *Burgess vs. Abbott*, 6 *Hill (N. Y.)*, 135; *Scofield vs. Van Syckle*, 23 *How. Pr. (N. Y.)*, 97, and other early New York cases to the contrary.

Ehle vs. Purdy, 6 *Wend. (N. Y.)*, 629. (One of two joint obligees cannot sue unless he avers the other is dead; and the objection, when it appears, may be raised by demur-

rer or in arrest of judgment. Wherever, by reason of a several interest, one may sue, he must set forth the bond truly, and then, by proper averments, show a cause of action in himself alone, clearly embraced within the condition.)

Sullivan vs. N. Y. and Rosedale Cement Co., 14 *N. Y. Civ. Pro. R.*, 365. [Citing also *Sanders vs. Yonkers*, 63 *N. Y.*, 488.]

Scott vs. Godwin, 1 *B. & P.*, 67. (Death will not be presumed.)

[*Contra*, *Gilbert vs. Allen*, 57 *Ind.*, 524; *s. p.*, *Davis vs. Willis*, 47 *Tex.*, 154.]

² *Am. Ins. Co. vs. Gibson*, 104 *Ind.*, 336; *s. c.*, 3 *North East. Rep.*, 892, 895.

XIII. DEMURRER FOR PENDENCY OF A FORMER SUIT.

§ 448. When demurrer lies.

§ 449. General rule.

§ 448. *When demurrer lies.*—The provision of the *N. Y. Code* allowing demurrer on the ground of the pendency of another action for the same cause, does not change the rule as to what prior proceeding is ground of abatement or stay,¹ but simply allows the objection recognized by settled practice to be taken by demurrer when the fact appears on the face of the complaint.²

¹ *Burrows vs. Miller*, 5 *How. Pr. (N. Y.)*, 51. (As to what are the grounds and limit of the defence, see note in 26 *Abb. N. C.*, 218, where the cases are collected.)

² *Hornfager vs. Hornfager*, 1 *Code R. N. S. (N. Y.)*, 412. (Objection not available unless the facts appear on the face of the complaint.)

§ 449. *General rule as to double vexation.*—If it appears by the pleading demurred to that the former action

is in the jurisdiction of the same state or nation, embraces the same plaintiff and the same defendant, and is for the same subject, effect, and relief, the present action is presumed on demurrer to be unnecessary and vexatious, if nothing to indicate the contrary appears.¹

If the prior action is in a foreign country, the court will not so presume.²

¹ Radford vs. Folsom (*U. S. C. Ct. S. D. Iowa*), 14 *Fed. Rep.*, 97.

Hyman vs. Helm (*Eng. Ct. of App.*), 24 *Ch. Div.*, 531; s. c., 49 *L. T. R. N. S.*, 376; s. c., 23 *Weekly Rep.*, 258. (BRETT, M. R.)

[*Contra*, Lynch vs. Hartford Fire Ins. Co., 17 *Fed. Rep.*, 627, citing Stanton vs. Embree, 93 *U. S.*, 548.]

* McHenry vs. Lewis (*Eng. Ct. of App.*, 1883), 31 *Weekly Rep.*, 305; aff'g 22 *Ch. Div.*, 397; s. c., 46 *L. T. R. N. S.*, 567. (Question arising on motion to stay.)

Hyman vs. Helm, 24 *Ch. Div.*, 531; s. c., 49 *L. T. R. N. S.*, 376; 32 *Weekly Rep.*, 258.

Hatch vs. Spofford, 22 *Conn.*, 485. (A second suit is not necessarily vexatious; but all the circumstances are to be considered. If the second suit secures a better remedy it is not to be deemed vexatious.)

XIV.—DEMURRER TO ANSWER.

[Following the Common Law practice of demurrer to plea, the New Procedure allows demurrer to answers in equitable as well as legal actions. In Equity demurrer to answer is not allowed.¹]

[The technical rule of the old practice, requiring greater certainty in special pleas than in declarations, and greater certainty in pleas in abatement than in others,² is not in force under the New Procedure, the test now being the same in all cases, viz., whether the adverse party has been fairly apprised

¹ Crouch vs. Kerr, 38 *Fed. Rep.*, 549 (striking out a demurrer, because the remedy is to except, or to set the cause down for hearing on bill and answer).

² Pitts Sons Mfg. Co. vs. Com. Nat. Bk., 121 *Ill.*, 582; Humphreys vs. Newport News, etc., Co. 33 *W. Va.*, 135; s. c., 10 *South East. Rep.*, 39; 1 *Chitt. Pl.* 16 *Am. ed.*, 257.

of the matter to be tried. Nevertheless answers are more strictly scrutinized than complaints, and dilatory answers more strictly than answers to the merits, because of the greater temptation to plead evasively. But under the New Procedure the remedy for uncertainty in either case is by motion to make definite.]

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| 1. GENERAL PRINCIPLES, §§ 450-462. | 4. DEMURRER TO NEW MATTER CON- |
| 2. DEMURRER TO DENIALS (INCLUDING | SIDERED AS CONSTITUTING A |
| FACTS PROVABLE UNDER GEN- | COUNTERCLAIM OR GROUND OF |
| ERAL ISSUE), §§ 463-465. | AFFIRMATIVE RELIEF, §§ 473- |
| 3. DEMURRER TO NEW MATTER CON- | 484. |
| SIDERED AS CONSTITUTING A | 5. DEMURRER BY A CO-DEFENDANT, |
| MERE DEFENCE, §§ 466-472. | § 485. |

1. GENERAL PRINCIPLES.

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|--------------------------------------------------------------------|-----------------------------------------------------|
| § 450. Single answer to several counts, etc. | § 458. Equitable bar without affirmative relief. |
| 451. Several defences in one answer. | 459. Common-law defences on equitable grounds. |
| 452. Effect of bill of particulars. | 460. Inconsistency not ground of demurrer. |
| 453. Documents required by statute to be filed, etc. | 461. Defendant may attack declaration or complaint. |
| 454. The same.—“Foundation of defence.” | 462. — aider of complaint on demurrer to answer. |
| 455. The same,—defendant’s use of plaintiff’s exhibit. | [As to facts occurring pending the suit see § |
| 456. Failure to meet plaintiff’s avoidance of anticipated defence. | |
| 457. Equitable defences. | |

§ 450. *Single answer to several counts, etc.*—If a declaration at Common Law¹ or a complaint under the New Procedure² contains several counts or causes of action, an answer purporting to be to the whole pleading, without discrimination,³ is bad on demurrer, unless it is sufficient as an answer to each count or cause of action.

¹ *Hogan vs. Ross*, 13 *How. (U. S.)*, 173; s. c., 14 *Law. ed.*, 100.

Gebbie vs. Mooney, 121 *Ill.*, 255; s. c., 12 *North East. Rep.*, 472.

1 *Chitt. Pl.*, 16 *Am. ed.*, 579.

[*Compare* *Babb vs. Mackey*, 10 *Wis.*, 371, (holding that a plea may still stand for what it does answer, though it professes to answer the whole, if other pleas which answer the other grounds of complaint also accompany it.)]

* *Abshire vs. Corey*, 113 *Ind.*, 484; s. c., 13 *West. Rep.*, 297; 15 *North East. Rep.*, 685.

Ross vs. Duffy, 12 *N. Y. State Rep.*, 584.

* But a separate defence which does not expressly say which cause of action it refers to may nevertheless be deemed to "distinctly refer" to one, within the meaning of the statute, if incapable of being understood as referring to any but that one. *Crasto vs. White*, 52 *Hun (N. Y.)*, 473; s. c., 23 *State Rep.*, 535; 17 *Civ. Pro. R.*, 46; 5 *N. Y. Supp.*, 718.

§ 451. *Several defences in one answer.*—If an answer contains several defences, a demurrer purporting to be to the whole answer without discrimination cannot be sustained if any defence is good.

Flint vs. Dulany, 37 *Kans.*, 332; s. c., 15 *Pacif. Rep.*, 208. But a demurrer expressed to be to "each and every defence contained in the answer," is the same in effect as though plaintiff had demurred separately to each defence. *Kennagh vs. McGolgan*, 21 *State Rep.*, 326; s. c., 4 *N. Y. Supp.*, 230.

§ 452. *Effect of bill of particulars.*—On demurrer to an answer, the bill of particulars furnished under the complaint cannot be considered; and if the answer does not show a defence to the complaint, it is not sufficient that it shows a defence to a claim specified in the bill of particulars.

Van Zant vs. Shelton, 40 *Miss.*, 332; *Dibble vs. Kempshall*, 2 *Hill (N. Y.)*, 124. (At Common Law.)

Kreiss vs. Seligman, 8 *Barb. (N. Y.)*, 439. (Under the Code.)

[*Compare* *Rundlett vs. Weeber*, 69 *Mass. (3 Gray)*, 263, (holding that although the answer must be to the count

and not to the bill of particulars, if plaintiff, counting for goods sold, and, by a separate count, for the balance due, files a bill of particulars applying in terms to each count, he cannot, upon defendant sufficiently answering that the sales were illegal, take judgment for want of an answer to the count on the balance of account.)) [Mass. Pub. Stat. 1882, c. 167, § 10, makes the bill of particulars filed with one of the common counts a part thereof, to be answered as such.]

In *Thurston's Admr. vs. Oldham*, 6 *Bush* (Ky.), 16, it was held that where the count alleged indebtedness on an account, a denial of indebtedness without taking issue on any of the items was bad.

[Compare also *Beard vs. Porter*, 124 U. S., 437, 31 L. ed., 492. Here a complaint to recover duties paid, failed to allege that the suit was brought within the prescribed time, but the bill of particulars showed, as prescribed by statute, the date of appeal to the Secretary of the Treasury, and the date of his decision. On demurrer to the answer,—*Held*, that it was no defect, in the light of the statements of the bill of particulars; hence, the answer being bad, judgment ordered for plaintiff.]

§ 453. *Documents required by statute to be filed, etc.*
—Under Statutes¹ and Rules of Court requiring “instruments” pleaded to be filed or furnished with the pleading, if the effect of the statute is to make the exhibit a part of the pleading, an answer based on a written instrument, a copy of which is not filed with or made part of it, is bad on demurrer.² But upon the same principles that have already been stated in reference to pleading exhibits,³ an instrument that is only collaterally involved is not within the statutes.⁴

¹ For these statutes and their object see RECEPTION OF EVIDENCE.

² *Strough vs. Gear*, 48 *Ind.*, 100.

Hosford vs. Johnson, 74 *id.*, 479. (Cross-complaint seeking foreclosure of a senior mortgage.)

³ See § 236, etc., DEMURRER VI., *Documents*.

⁴ *Robards vs. Marley*, 80 *Ind.*, 185. (To a pleading seeking to rescind a land contract, a deed of reconveyance tendered by defendant is not a proper exhibit.)

§ 454. *The same*—"Foundation of defence."—Where defendant sets up a covenant or obligation of the plaintiff, and a breach thereof, as a defence, the instrument containing the covenant is within the statute.¹

But if the breach consists of the existence of an incumbrance in violation of the covenant set up, the instrument constituting the breach is not the foundation of the defence, and not within the statute.²

So it is held that in an action for breaking and entering a close, defendant need not set forth in his answer a lease under which he justifies.³

And where defendant sets up a deed from plaintiff for right of way under which he justifies, the deed is not within the statute.⁴

¹ *Nosler vs. Hunt*, 18 *Iowa*, 212. (Counterclaim for breach of covenant in a deed.)

Galbraith vs. McNeily, 40 *Ind.*, 231. (Failure of consideration for note sued on, by reason of breach of covenant in deed.)

Avery vs. Dougherty, 102 *Ind.*, 443; *Ashley vs. Foreman*, 85 *Ind.*, 55. (Failure of consideration for note sued on, because of eviction contrary to a covenant in lease.)

Landon vs. White, 101 *Ind.*, 249. (Action on note: answer that plaintiff violated conditions of mortgage given as collateral.)

² *Strain vs. Huff*, 45 *Ind.*, 222.

³ *Dillon vs. Brown*, 11 *Gray (Mass.)*, 179.

⁴ *Taylor vs. Cedar Rapids & St. P. R. Co.*, 25 *Iowa*, 371.

§ 455. *The same*,—*defendant's use of plaintiff's exhibit*.—If plaintiff has duly filed and referred to an exhibit effectually making it a part of his pleading, a defendant desiring to plead the same instrument may refer to it as that "of which a copy is filed with the complaint," without setting out an additional copy.¹

But cannot do so except by expressly referring to it in his pleading, so as to identify it.²

If he has thus made plaintiff's exhibit a part of his

own pleading, his answer, if a sufficient defence to the instrument, is good, although it would not be a sufficient defence to the allegations of plaintiff's pleading; for the exhibit controls.³

¹ *Pattison vs. Vaughan*, 40 *Ind.*, 253; *Sidener vs. Davis*, 69 *Ind.*, 336; *Grubbs vs. Morris*, 103 *Ind.*, 166.

² *Campbell vs. Routt*, 42 *Ind.*, 410; *Watkins vs. Hill*, 106 *Ind.*, 543.

³ *Liberty Tp. Draining Asso. vs. Watkins*, 72 *Ind.*, 459.

§ 456. *Failure to meet plaintiff's avoidance of anticipated defence.*—It is the better opinion that if plaintiff's complaint states and avoids an anticipated defence, an answer which sets up that defence is insufficient if it does not also meet the avoidance.

For authorities on this question see note in 25 *Abb. N. C.*, 120.

s. P., *Lemon vs. Dryden*, 43 *Kans.*, 477.

Denial of part and avoidance of other parts of an alleged cause of action may be sufficient as a single defence. *Colglazier vs. Colglazier*, 117 *Ind.*, 460.

§ 457. *Equitable defences.*—Under the New Procedure which allows equitable defences in actions of a legal nature,¹ and allows defendants to claim equitable relief,² an answer which states an equitable defence must allege the facts constituting it as fully and clearly as if it were relied on as a cause of action for affirmative relief in equity.³

¹ *Cake vs. Peet*, 49 *Conn.*, 501.

Rose vs. Williams, 5 *Kans.*, 483.

Dobson vs. Pearce, 12 *N. Y.*, 156; *Crary vs. Goodman*, 12 *N. Y.*, 266; *Peck vs. Brown*, 26 *How. Pr. (N. Y.)*, 350; *Mandeville vs. Reynolds*, 68 *N. Y.*, 528.

Abouloff vs. Oppenheimer (*Eng. Ct. of App.*), *L. R.* 10 *Q. B.*, 295; *s. c.*, 30 *Weekly Rep.*, 429.

² Even in an inferior local court not having general equity jurisdiction. *Mack vs. Kitsell*, 20 *Abb. N. C.*, 293.

For an interesting history of the introduction of equitable defences into common law actions in Pennsylvania, see 1 *Law Quarterly Rev.*, 458.

For the Mass. rule see *Sherman vs. Galbraith*, 141 *Mass.*, 440; s. c., 5 *North East. Rep.*, 858.

³ *Downer vs. Smith*, 24 *Cal.*, 114; *Hughes vs. Davis*, 40 *Id.*, 117; *Bruck vs. Tucker*, 42 *Id.*, 346.

Ward vs. Winn, 42 *Ga.*, 323.

Ells vs. Pacific R. Co., 51 *Mo.*, 200.

Cummings vs. Morris, 25 *N. Y.*, 625. (Action on note: equitable set off or counterclaim for a partnership accounting would have been good but for lack of allegation of insolvency of estate of deceased partner.)

§ 458. *Equitable bar without affirmative relief*.—An answer which states facts that without affirmative relief constitute an equitable bar is sufficient for that purpose.¹ But an equitable defence on which, by reason of the absence of an indispensable party, the court cannot go on to grant some necessary affirmative relief to the defendant is not sufficient.²

¹ *Hoppock vs. Strubble*, 60 *N. Y.*, 430. (Ejectment by vendor; defence that there was a mistake in quantity in mesne conveyances.)

Cythe vs. La Fontaine, 51 *Barb. (N. Y.)*, 186. (Ejectment against purchaser from plaintiff's vendor: defence that at the time of the alleged default by defendant and rescission by plaintiff's vendor, defendant's time had been extended.)

Cramer vs. Benton, 60 *Barb. (N. Y.)*, 216; s. c., 64 *Id.*, 522.

[The appellate court can direct the award of affirmative relief if the right is contested at the trial, but a provision to that effect omitted from the judgment. *Born vs. Schrenkheisen*, 110 *N. Y.*, 55.]

Winslow vs. Winslow, 52 *Ind.*, 8.

Webster vs. Bond, 9 *Hun (N. Y.)*, 438; *Hicks vs. Shepard*, 4 *Lans. (N. Y.)*, 335.

[Compare *Campbell vs. Jones*, 25 *Minn.*, 155. (Action to determine conflicting claims. Error to sustain demurrer to answer which showed a bar against plaintiff, because it also asked to annul a judgment the parties

in which were not joined in this action.) *Compare* also *Du Pont vs. Davis*, 35 *Wisc.*, 631.]

[For other cases see *Glacken vs. Brown*, 39 *Hum.*, 295; *Pennoyer vs. Allen*, 50 *Wisc.*, 308; s. c., 51 *Id.*, 360; *Despard vs. Walbridge*, 15 *N. Y.*, 374; *Barker vs. Circle*, 60 *Mo.*, 258, 264; *Lombard vs. Cornham*, 34 *Wisc.*, 486.]

§ 459. *Defences in U. S. Courts on equitable grounds.*

—The rule that equitable defences cannot be pleaded in a common-law action, even in a United States court sitting in a Code state,¹ does not preclude defences founded on such equitable principles as courts of common law have recognized,—such as the equitable rights of a surety,² or equitable estoppels,³—if no specific equitable relief or equitable procedure is required.

And the fact that the answer asks for specific relief unnecessarily, does not render the defence unavailable.⁴

¹ *Montijo vs. Owen*, 5 *Abb. N. C.*, 110; s. c., 14 *Blatchf.*, 324. (Action on judgment: defence that it was inequitably recovered in defendant's absence: bad on demurrer, because cause of action was legal.)

Doe dem. Myrick vs. Roe, 31 *Fed. Rep.*, 97. (Ejectment; allowance for improvements made in good faith cannot be granted.)

Snyder vs. Pharo, 25 *Fed. Rep.*, 398. (Set-off of assigned claim not allowable at law.)

Burnes vs. Scott, 117 *U. S.*, 582; s. c., 29 *Law. ed.*, 991. (Want of consideration, as an equitable defence involving settlement of partnership.) [*Compare Herklotz vs. Chase*, 32 *Fed. Rep.*, 433.]

Church vs. Spiegelburg, 24 *Blatchf.*, 540; s. c., 31 *Fed. Rep.*, 601. (Action by partner against copartner for breach of articles: counterclaim for accounting not admissible.)

² *Presdt., etc., of Union Bank vs. Crine*, 21 *Abb. N. C.*, 146.

³ *Kirk vs. Hamilton*, 102 *U. S.*, 68. (Equitable estoppel available in ejectment, even under plea of not guilty.)

⁴ *Presdt., etc., of Union Bank vs. Crine*, 21 *Abb. N. C.*, 146.

§ 460. *Inconsistency not ground of demurrer.*—Inconsistency between several defences¹ or counterclaims²

or either is not ground for demurrer. Nor can a demurrer to one defence or counterclaim be aided by what is contained in another.³

Even where the statutory permission to plead several defences is confined to consistent defences, an avoidance which does not expressly nor by necessary implication admit the cause of action is not inconsistent with a denial.⁴

Inconsistency between different allegations in the same defence or counterclaim has the same effect as inconsistency in the allegations of a cause of action.⁵

¹ *Goodwin vs. Wertheimer*, 99 *N. Y.*, 149; *Bruce vs. Burr*, 67 *N. Y.*, 237; aff'g 5 *Daly*, 510. (So held on the ground of the provisions of the *N. Y. Code* allowing inconsistent defences.)

[Distinguished, as relating to matters in bar only, under the *Code*; and held that a defendant ought not to be permitted to set up a defence in abatement, and in the same answer to contradict it by matter pleaded in bar. *Hooker vs. Green*, 50 *Wisc.*, 278; s. p., *dictum* in *Cannon vs. Lindsey*, 85 *Ala.*, 198; s. c., 7 *Am. St. R.*, 38; 3 *South. Rep.*, 676. It should be observed, however, that the *N. Y.* rule rests on the fact that in cases where absolute untruthfulness is indicated by inconsistency, the remedy by motion (*McIntire vs. Wiegand*, 24 *Abb. N. C.*, 312) is more appropriate, as allowing of support or explanation by affidavit.]

Noonan vs. Bradley, 9 *Wall.*, 394, 402, (holding that the remedy is by motion to strike out one, or to compel defendant to elect).

Cannon vs. Lindsey, 85 *Ala.*, 198; s. c., 7 *Am. St. Rep.*, 38; 3 *So. Rep.*, 676. (Plea of denial of executing note, and plea of set-off, not bad on demurrer.)

[*Contra*, *Lyons vs. Ward*, 124 *Mass.*, 364.]

² *Bruce vs. Burr*, (*above cited*).

Ewing vs. Shaw, 83 *Ala.*, 333; s. c., 3 *So. Rep.*, 692. (Denial; and plea of contributory negligence; and counterclaim of damages for injury thereby.—*Held*, that under the system of pleading in Alabama, duplicity is no objection to a plea in bar.)

[*Contra*, *Magowan vs. St. Louis R. W. Supplies Mfg. Co.*, 16 *Fed. Rep.*, 738.]

* *Ayres vs. Covill*, 18 *Barb.*, 260. HAND, P.J., said: "The admission made in the course of a pleading is not an admission for all the purposes of the cause; but as Lord Denman stated in *Robins vs. Maidstone* (4 *Q. B. Rep.*, 811), correcting what he had said in *Bingham vs. Stanley* (2 *Q. B. Rep.*, 127), is an admission 'for all purposes regarding the issue arising from that pleading.'"

For other cases see *Ozark Land Co. vs. Leonard*, 24 *Fed. Rep.*, 660; *Abst. s. c.*, 32 *Alb. L. J.*, 413, (holding inconsistent answers not available as an affidavit of merit). *Hummel vs. Moore*, 25 *Fed. Rep.*, 380; *s. c.*, 20 *Reporter*, 777, (sanctioning inconsistent defences in cause removed from State court). *Bachman vs. Everding*, 1 *Sawyer*, 70, (inconsistency not shown for purpose of striking out, by mere comparison.) *Flint vs. Dulany*, 37 *Kans.*, 332, 336; *s. c.*, 15 *Pacif. Rep.*, 208, (demurrer for inconsistency as a misjoinder entertained). *Parr vs. Johnson*, 37 *Minn.*, 457; *s. c.*, 25 *North West. Rep.*, 176, (motion for new trial). *Ross vs. Duffy*, 12 *N. Y. State Rep.*, 584, (demurrer for inconsistency not sustainable). *Lansing vs. Parker*, 9 *How. Pr.*, 288, (general denial; defence that plaintiff committed first assault, and defence that plaintiff was disorderly in defendants' inn, and refusing to leave on request, they gently put him out,—not inconsistent;) [followed in *Cohrs vs. Fraser*, 5 *So. Car.*, 351]. *McDonald vs. Am. Mortgage Co.*, 17 *Oreg.*, 626; *s. c.*, 21 *Pacif. Rep.*, 883, (inconsistency of allegations with general denial; but not with qualified denial.) *Coute vs. Ball*, 3 *Atk.*, 496, 499, (denial and allegation of waiver not inconsistent). 2 *Chitt. Pl.*, 16 *Am. ed.*, tit. Indemnity. (Denial of receiving and allegation of paying over, not inconsistent.)

See also DEFINING THE ISSUE.

* *Evans vs. Thomas*, 32 *Kan.*, 469, 473. (Allegation of good reason for not performing; not inconsistent with allegation of performance.)

Shea vs. Augustine, 14 *Kan.*, 282. (Usury; payment; and suretyship and extension of time discharging defendant;—not inconsistent.)

Wheaton vs. Nelson, 11 *Gray (Mass.)*, 15. Denial; and plea of delivery of goods in payment and by way of set-off, not inconsistent.)

Bierer vs. Fretz, 32 *Kans.*, 329.

Payson vs. Macomber. 3 *Allen (Mass.)*, 69. Denial of speaking the defamatory words, and allegation of their truth not inconsistent.)

Ledbetter vs. Ledbetter. 88 *Mo.*, 60; *s. c.*, 3 *West. Rep.*, 917. (Ejectment. Denial, coupled with an equitable

defence. BLACK, J., says: The defendant in an action of ejectment may plead by way of a general denial and rely upon that as a complete defence. He may also in the same answer plead an equitable defence and rely upon that as an independent defence. But the defendant will frame his pleading so as to show that he relies upon both defences. If, in pleading his equity, he unqualifiedly and absolutely pleads title or right to the possession out of himself and in the plaintiff but for the equities, then we see no reason why the plaintiff should be required to offer any evidence, especially if he waives damages, rents, and profits. If the defendant will make such an absolute admission on the record, it is difficult to see how there can be an accompanying denial of the same matter. Pleadings are expected to tell the truth.)

S. P., *Otis vs. Ross*, 8 *How. Pr. (N. Y.)*, 195. (Held, on motion to strike out,—not inconsistent to deny having made the alleged representations; and also to deny that the alleged representations were false. SHANKLAND, J., said: "It may be true that the defendant never represented to the plaintiff that he was in good circumstances at the time of the purchase of the goods, and yet he may in fact have been in good circumstances. It would be exceedingly unjust to drive him to admit either that he made the representations of his wealth or that they were false.")

* See *Freeman vs. Frank*, 10 *Abb. Pr.*, 370.

§ 461. *Defendant may attack declaration or complaint.*

—At Common Law,¹ on demurrer to a plea (other than in abatement²), a defect in the declaration (or, if the plea is to part of it only, a defect in the part the plea is addressed to³), if it be such as would have sustained a general demurrer,⁴ calls for judgment against the plaintiff⁵ (or the condemnation of the part of the declaration addressed by the plea), irrespective of whether the plea is good or not.⁶

But this rule does not avail a defendant who has pleaded to the whole declaration by another plea or defence than the one demurred to.⁷

This principle applies, under the New Procedure,⁸ not

only to legal causes of action, but also to equitable causes of action⁹ in the State courts.

And it applies to a defective counterclaim as well as to matter merely in defence.¹⁰

It is the better opinion that it does not allow a defendant who has not demurred¹¹ to the complaint to raise any objection other than that the complaint does not state facts sufficient to constitute a cause of action, that the court has not jurisdiction of the subject,¹² and that a person not joined is an indispensable party.¹³

¹ Against application of the rule in equity, see *Sperry vs. Miller*, 2 *Barb. Ch.*, 632, 635; *Lawrence vs. Pool*, 2 *Sandf.*, 540; *contra*, see *Beard vs. Bowler*, 2 *Bond*, 13; *Goodyear vs. Toby*, 6 *Blatchf.*, 130. See cases collected in 25 *Abb. N. C.*, 224.

² *State vs. Hamlin*, 47 *Conn.*, 95, 118. (Criminal case citing civil case. But the court nevertheless considered the case as if the rule did apply.)

Shaw vs. Dutcher, 19 *Wend.*, 216, 222.

Indiana, Bloomington, etc., R. Co. vs. Foster (*Ind.*, 1886), 5 *West Rep.*, 659 (under Code).

³ *Smith vs. Lloyd*, 16 *Gratt.*, 295, 309. (MONCURE, J., says: "The principle is that a demurrer by the plaintiff to the defendant's plea cannot operate as a demurrer by the defendant to the plaintiff's declaration to any greater or less extent than the plea of the defendant was pleaded to the declaration.")

[Compare *Ward vs. Sackrider*, 3 *Cal.*, 263; *United States vs. White*, 2 *Hill*, 59, 61 (Holding that if there was one good count, and the plea was to the whole, defendant could not prevail by pointing out a bad count).]

⁴ *Tubbs vs. Caswell*, 8 *Wend. (N. Y.)*, 130 (*Ct. of Errors*). *United States vs. Linn*, 1 *How. (U. S.)*, 104; s. c., 11 *Law. ed.*, 64.

⁵ *Ensign Co. vs. Carroll*, 30 *W. Va.*, 532, 538; s. c., 4 *South East Rep.*, 782.

⁶ The practice is, where a sufficient objection is raised under this rule, not to examine the sufficiency of the pleading demurred to.

⁷ *Morey vs. Ford*, 32 *Hun*, 446. (Under the Code, following common-law authorities; and holding that the rule does not allow objection to an allegation which has been admitted.)

⁹ *Meredith vs. Scallion*, 51 *Ark.*, 361; 3 *L. R. A.*, 812; s. c., 11 *South West Rep.*, 516. (Ejectment.)

Donell vs. Hannah, 80 *Ind.*, 497. (A bad answer is good enough for a bad complaint, and a demurrer to the answer should be overruled.)

⁹ *People vs. Booth*, 32 *N. Y.*, 397.

¹⁰ *Lawe vs. Hyde*, 39 *Wisc.*, 345.

¹¹ According to *People ex rel. Weber vs. Spring Valley*, 129 *Ill.*, 169; s. c., 21 *North East.*, 843, a previous decision overruling a demurrer to the complaint does not conclude the Court from holding the complaint bad, on the hearing of a subsequent demurrer to a later pleading in the same series.

Contra, *Parsons vs. Hayes*, *N. Y. Daily Reg.*, Dec. 14, 1882. ARNOUX, J., said: "This being an equity action, and the complaint having been substantially held good on a former demurrer, the sufficiency of the complaint is on this hearing *res adjudicata*, and the answers should be liberally construed to permit the hearing of all the questions between the parties."

¹² *Brand vs. Storm*, *N. Y. Daily Reg.*, Jan. 31, 1886. (Demurrer to counterclaim. The Court say: "Plaintiff should not be defeated on his demurrer to the answer because his complaint was demurrable for improper joinder of causes of action. That ground of demurrer has been waived by defendants [i.e., by answering], and cannot be relied upon for any purpose now.")

[*Contra*, *Menifee vs. Clark*, 35 *Ind.*, 304. (The Court say: "Though the objection to the answer is waived unless the objection be taken by demurrer, it is not required that the demurrer which is to raise the question must be addressed to the answer and be filed by the plaintiff. If the demurrer be interposed at a later stage of the pleading the objection is taken by demurrer, just as effectually as if it was addressed to the answer and put on file by the plaintiff.")]

¹³ This, like the two preceding objections, may be taken without demurring. See § 445.

In *Smith vs. State*, 66 *Md.*, 215; s. c., 7 *Atl. Rep.*, 49, the appellate court held it error not to have entertained an objection to misjoinder of causes of action.

§ 462.—*aider of complaint on demurrer to answer.*—A defect in the complaint objected to by defendant on the hearing of a demurrer to his answer, is cured by an alle-

gation or express admission in the defence demurred to, supplying the defect in the complaint¹; but is not cured by an allegation or express admission in a separate defence.²

¹ *Vernam vs. Smith*, 15 *N. Y.*, 327, 331. (DENIO, C.J.)
s. p., *White vs. Joy*, 13 *N. Y.*, 83, rev'g 11 *How. Pr.*, 36. (Here on demurrer to reply, the answer replied to was held to cure a defect in the complaint.)

² *Ayres vs. Covill*, 18 *Barb. (N. Y.)*, 260.

2. DEMURRER TO DENIALS (INCLUDING FACTS PROVABLE UNDER GENERAL ISSUE).

§ 463. Mere denials.

464. Statutes requiring sworn denial.

§ 465. Facts provable under the general issue.

§ 463. *Mere denials*.—In New York and Wisconsin it is held that a mere denial is not demurrable.¹ Otherwise in some other States.²

¹ *Ketcham vs. Zerega*, 1 *E. D. Smith*, 553; *Nichols vs. Lumpkin*, 51 *Super. Ct. (J. & S.)*, 88. [But such demurrers have been sometimes sustained. 14 *Barb.*, 533; 60 *How. Pr.*, 178; *Fry vs. Bennett*, 5 *Sandf.*, 54.]

Nelson Lumber Co. vs. Carney, 34 *Minn.*, 243; s. c., 25 *North West. Rep.*, 406.

[The theory of this ruling is that the statute allowing demurrers only specifies answers containing new matter. If this be a sufficient reason, it is not because it requires statute authority to entertain a demurrer (see page 1), but because *expressio unius est exclusio alterius*.]

² *Hunter vs. Wilson*, 21 *Fla.*, 250.

Henderson vs. Henderson, 110 *Ind.*, 316; s. c., 11 *North East. Rep.*, 432; 9 *West. Rep.*, 88.

Haggard vs. Hay's Admr., 13 *B. Monr. (Ky.)*, 175; *Kentucky River Nav. Co. vs. Commonwealth*, 13 *Bush (Ky.)*, 435.

Stewart vs. Budd, 7 *Mont.*, 573; s. c., 19 *Pacif. Rep.*, 221.

Hanson vs. Lehman, 18 *Nebr.*, 564; s. c., 26 *North West. Rep.*, 249; *Phoenix Ins. Co. vs. Meier* (*Neb.*, 1889), 44 *North West. Rep.*, 97.

In *Tapacio Mining Co. vs. De Lima*, 13 *N. Y. State Rep.*, 543, it seems to have been held that an answer which denies the contract alleged in the complaint by setting up a different contract as the only one, and alleging its performance by defendant, is not new matter, but only a denial by giving a different version, and therefore not demurrable.

§ 464. *Statutes requiring sworn denial.*—As a general rule (in those jurisdictions where a bad denial is demurrable¹), the omission to comply with a statute requiring denials of the execution of written instruments, etc., to be verified, is ground of demurrer, if the effect of the statute is to make the failure to deny under oath equivalent to an admission,² and the admission is sufficient to sustain plaintiff's case.

Where the denial of the instrument is bad on demurrer, the defect does not vitiate other parts of the answer or plea which are unaffected by it.³

Where the effect of the statute is only to shift the burden of proof, the omission of verification is not ground of demurrer.⁴

¹ See §§ 463-4.

² *Mobile & M. R. Co. vs. Gilmer*, 85 *Ala.*, 422; s. c., 5 *South. Rep.*, 138; *Preston vs. Dunham*, 52 *Ala.*, 217.

Alexander vs. Bryan, 110 *U. S.*, 414; s. c., 28 *Law. ed.*, 195. (Alabama practice.)

Bell vs. Vicksburg, 23 *How. U. S.*, 443; s. c., 16 *Law. ed.*, 579. (Mississippi practice: but see statute under § 615, defining the issues.)

Bishop vs. Honey, 34 *Tex.*, 245. [*Contra*, *Robinson vs. Brinson*, 20 *Tex.*, 438.]

Contra, *Patrick vs. Conrad*, 2 *A. K. Marsh. (Ky.)*, 43. (Holding it error to sustain demurrer; because remedy is to object to filing.)

[Otherwise also in California, if the complaint is not verified. *Hastings vs. Dollarhide*, 18 *Cal.*, 390; *Corcoran vs. Doll*, 32 *Cal.*, 82.]

- * *Hill vs. Jones*, 14 *Ind.*, 389. (Suit on a note and mortgage: defendant pleaded a written release, and alleged it was lost, and plaintiff replied, denying, but did not verify. *Held*, that the reply was effectual as a traverse of all averments in the answer except as to execution.)
- McClintick vs. Johnston*, 1 *McLean*, 414.
- s. p., *Payner vs. Snell*, 4 *Mo.*, 238; *Snowden vs. McDaniel*, 7 *id.*, 313 (holding that the plea is not to be wholly stricken out as a nullity).
- * *Buchanan vs. Port*, 5 *Ind.*, 264; *Wade vs. Mussleman*, 14 *Ind.*, 362. [To the contrary was *Parker vs. State, ex rel. Town*, 8 *Blackf. (Ind.)*, 292.]
- Lyon vs. Bunn*, 6 *Iowa*, 48 (leading case); *Seachrist vs. Griffith*, 6 *Iowa*, 390.

§ 465. *Facts provable under the general issue.*—It is the better opinion that, under the New Procedure, a demurrer to a defence is not sustainable, merely because it consists of matters specially pleaded which will be admissible under a general denial contained in the same answer.

- Van Alstyne vs. Norton*, 1 *Hun*, 537; s. c., as *Van Alstyne vs. Crane*, 4 *Supm. Ct. (T. & C.)*, 113. (Evidence disproving charge of fraud: error to sustain demurrer.)
- Contra*, *Haley Livestock Co. vs. Routt County Ct. Comrs. (C. Ct. D. Colo.)*, 2 *Denv. Leg. News*, 275; *Birnbaum vs. Passenger Conductors' L. Ins. Co.*, 15 *W. N. C. (Pa.)*, 518, (at common law). See also *Davis vs. Dycus*, 7 *Bush (Ky.)*, 4, and last case under § 463.
- In *Hostetter vs. Auman*, 119 *Ind.*, 7, and *Kannady vs. Lambert*, 37 *Ala.*, 57, sustaining the demurrer was held not reversible error, because defendant was not precluded of his defence. In *Hopkinson vs. Shelton*, 37 *Ala.*, 306, overruling such objection was also deemed not reversible error.

3. DEMURRER TO NEW MATTER CONSIDERED AS CONSTITUTING A MERE DEFENCE.

[*Recoupment*; *set-off*; *counterclaim*; *cross-bill*.—The principles of pleading and evidence require us to discriminate between three kinds of cross-demands. The names used for these differ in different jurisdictions, and each practitioner will follow his own local usage; but the substantial differences inhere in the nature of cross-demands and their relation to the cause of action. (1) In an action on contract, defendant admitting (either absolutely or hypothetically) the transaction on which he is sued, may claim to cut down or extinguish (*recoup*) the damages claimed, by reason of qualifying circumstances in that transaction. This is simply a paring down of the proposed recovery; and defendant claims nothing unless plaintiff makes a *prima facie* case; and if plaintiff does so, defendant's claim rests on the same transaction, and only negatives part or possibly all of plaintiff's claim. This sort of cross-demand is allowed at Common Law, and known as recoupment. If defendant claims on any independent transaction, or claims a penny more than plaintiff claims, he goes beyond what the Common Law allows as recoupment. (2) Defendant may claim to reduce or extinguish plaintiff's demand by setting up a counter-demand arising, it may be, on some other transaction, but still interposed for the mere negative purpose of reducing or defeating plaintiff's claim. This he could not do in a court of common law; but must apply to Chancery to *set off* one claim against the other and prevent plaintiff from recovering any more than the excess, if any. The power to entertain a claim of set-off was for greater convenience conferred on common-law courts by statute (2 Geo. II., c. 22, § 13), and was inherited by common-law courts in this country; and here the question what may be set off depends on the statutes, and the principles adopted by courts of equity. (3) Counterclaim, which the Codes introduced in actions of a common-law nature by extending the principle of cross-bills in equity, under the form of an answer in the original cause, was intended to add to the right to extinguish plaintiff's claim, or a part of it, by recoupment or set-off, the right to recover affirmative relief against plaintiff on a cause of action against him, irrespective of whether or not plaintiff succeeded in establishing his cause of action against defendant. The statutes in several of the States adopt the name set-off, and in others the name counterclaim, for two or more of these classes of cases; but statutory expressions disre-

garding these substantial distinctions are not usually regarded as changing the law. See also p. 394: COUNTERCLAIM.]

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| <p>§ 466. Justification must state facts in detail.</p> <p>467. Partial defences—purporting to meet the whole cause of action.</p> <p>468. The same—purporting to meet only a part.</p> <p>469. Facts constituting mitigation necessary.</p> | <p>§ 470. Answer of facts after suit not demurrable.</p> <p>471. Mere defence not demurrable because of unnecessary demand of affirmative relief.</p> <p>472. Defensive answer aided by complaint.</p> |
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§ 466. *Justification must state facts in detail.*—If the plaintiff's pleading alleges an act which itself constitutes a wrong at common law, defendant's pleading setting up as a justification an authority for doing the act must allege the essential particulars. A mere allegation of its legal effect is bad on demurrer.

Bean vs. Beckwith, 18 *Wall.* (U. S.), 510. (Military arrest.) Compare *Rathbun vs. Martin*, 20 *Johns.*, 343, and *Vanderheyden vs. Young*, 11 *id.*, 150.

1 *Chitt. Pl.*, 16 *Am. ed.*, 560.

Pettingill vs. Lawrence, 20 *Bradw. (Ill.)*, 552. (Entry of defendants as drainage commissioners must show legal appointment, and legal condemnation of premises.)

Van Etter vs. Hurst, 6 *Hill (N. Y.)*, 311. (Facts necessary to show jurisdiction must be alleged.) [But see short form for so doing under § 284, *Judgment.*]

§ 467. *Partial defences—purporting to meet the whole cause of action.*—At Common Law¹ and in Equity,² a plea which purports to answer the whole of a cause of action is bad on demurrer if it fails to meet the whole.

The same rule applies to an answer under the New Procedure.³

¹ *Gebrie vs. Mooney*, 121 *Ill.*, 255.

² *Davidson vs. Schermerhorn*, 1 *Barb. (N. Y.)*, 480.

³ *Curran vs. Curran*, 40 *Ind.*, 473; *McLead vs. Ætna Life Ins. Co.*, 107 *Ind.*, 394; s. c., 8 *North East. Rep.*, 230.

Martin vs. Swearingen, 17 *Iowa*, 346.

Thompson vs. Halbert, 109 *N. Y.*, 329; s. c., 21 *Abb. N. C.*, 266, rev'g 40 *Hun*, 536; *Maxon vs. Delaware, L. & W. R. Co.*, 48 *Hun*, 172.

Fitzsimmons vs. City Fire Ins. Co., 18 *Wisc.*, 234.

§ 468. *The same—purporting to meet only a part.*—At Common Law a plea which purports to answer only as to a separable part of a cause of action,—as for instance a plea of part payment,¹—is not therefore bad on demurrer.

Otherwise of a plea of matter merely going in mitigation of unliquidated damages.²

Under the New Procedure an answer which expressly purports to be only a partial defence, even though it goes only in mitigation of unliquidated damages, is not therefore demurrable, if it meets any part of the demand.³

¹ *Solary vs. Schultz*, 22 *Fla.*, 263.

Somerville vs. Stewart, 48 *N. J. L.*, 116, 3 *Atl. Rep.*, 77; s. c., 77; s. c., 2 *Centr. Rep.*, 711. (Holding that such a plea is not to be struck out on motion. SCUDDER, J., says: "It is not necessary that he should answer the whole declaration in one plea, for a plea is good which answers any part of a count which is material and severable, as a basis of recovery; care must be taken, however, in drawing such plea, that it begins properly, for if it commences as an answer to the whole but is to part only, it will be bad on demurrer. If it begins by answering only part of the plaintiff's count, and is in truth but an answer to part, and does not in that or in any other plea notice the remainder of the declaration, the plaintiff cannot demur to the plea, for it is sufficient as far as it extends, but must take judgment for the part unanswered, as by *nil dicit*. *Flemming vs. Hoboken*, 11 *Vr.*, 270; 1 *Ch. Pl.*, 523; *Grafflin vs. Jackson*, 11 *Vr.*, 440; *Com. Dig. Pl.* (E. 1); 1 *Saund. R.*, 28; 5 *Rob. Pr.*, C. 19, p. 168.")

² *Grayson vs. Brooks*, 64 *Miss.*, 410.

The same was held in early cases under the Code.

³ *Loosey vs. Orser*, 4 *Bosw.*, 391, 403. (Action against sheriff, for escape.)

Bradner vs. Faulkner, 93 *N. Y.*, 515; rev'g 16 *Weekly*

Dig., 240. (Holding it error to strike out matter in mitigation, alleged in action for false imprisonment or malicious prosecution.) s. p., *Smith vs. Ottendorfer*, 3 *N. Y. State Rep.*, 187 (libel); s. p., *Battell vs. Wallace* (*C. Ct. S. D. N. Y.*), 30 *Fed. Rep.*, 229 (libel).

Cothran vs. Hanover Nat. Bk., 40 *N. Y. Super. Ct. (J. & S.)*, 401. (Error to refuse leave to file supplemental answer, setting up newly discovered facts, in mitigation of damages by alleged conversion.)

Peebles vs. Isaminger, 18 *Ohio St.*, 490.

United States vs. Ordway (*C. Ct. D. Oreg.*), 30 *Fed. Rep.*, 30.

§ 469. *Facts constituting mitigation necessary.*—An answer relying on mitigation as a partial defence is demurrable if it does not state the facts constituting the mitigating circumstances.

Hager vs. Tibbitts, 2 *Abb. Pr. (N. S.)*, 97; *Ball vs. Evening Post Pub. Co.*, 38 *Hun (N. Y.)*, 11; *Knox vs. Commercial Agency*, 40 *id.*, 508; *Hathorn vs. Congress Spring Co.*, 44 *id.*, 608.

§ 470. *Answer of facts after suit not demurrable.*—An answer stating, as a defence, facts which occurred after the commencement of the action is not on that account demurrable.

Lewellen vs. Crane, 113 *Ind.*, 289; s. c., 12 *West. Rep.*, 918; 15 *North East.*, 515 (holding that the remedy is by motion).

[But see DEMURRER TO SUPPLEMENTAL PLEADING, *below.*]

§ 471. *Mere defence not demurrable because of unnecessary demand of affirmative relief.*—A statement of matter sufficient to constitute a defence, of a nature that requires no affirmative relief, is not made demurrable by the addition of a demand for affirmative relief.

Schumacher vs. Seeger, 65 *Wisc.*, 394.

[*Contra*, *Millar vs. Roberts*, 106 *Ind.*, 63.]

[*Compare* § 471.]

§ 472. *Defensive answer aided by complaint.*—The omission from an answer of an allegation of a fact necessary to make out the defence intended, does not render the answer bad on demurrer if the fact appears from the complaint.¹ But if the answer be addressed to one of several counts or causes of action, it cannot be aided by a fact appearing only in another to which it is not addressed.²

¹ *Gebhart vs. Sorrels*, 9 *O. St.*, 461, 466. (Action on sealed note not negotiable, bearing on its face a waiver of acceptance and of protest; and the petition alleged that it was indorsed to plaintiff "by a bank without recourse." The Court say: "These circumstances shown by the petition being taken in connection with the statements in the answer, a court or a jury might well say that the plaintiff was not a holder for value, in the usual course of trade. [*Roxborough vs. Messick*, 6 *O. St.*, 448–458.] And, therefore, a court would not be able to say, with the clearness and certainty required to strike out an answer for insufficiency, or to sustain a general demurrer, that in no view of the statements in the pleadings was there a defence to the action." Judgment therefore reversed.)

² *Reed vs. Inhabitants of Scituate*, 89 *Mass.* (7 *Allen*), 141.

4. DEMURRER TO NEW MATTER PLEADED AS CONSTITUTING A COUNTERCLAIM OR GROUND OF AFFIRMATIVE RELIEF.

[For the distinction between purely defensive answers and counterclaims, see introductory note to 3, on page 390. The statutes in different States are so diverse that a collation of them here would not be practically useful. After an examination of all those statutes, I have selected such decisions for citation here as may be useful in support of the generally recognized propositions which I have laid down as to Demurrer to Counterclaim.]

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| § 473. Objection to sufficiency. | § 480. Objections to availability, — |
| 474. Objections to availability. | allegation of "same transaction." |
| 475. — in actions for specific relief,
etc. | 481. Time of accrual or vesting. |
| 476. — in actions for money demand, —
counterclaim of specific relief. | 482. Omission to ask affirmative
relief. |
| 477. — contract and tort. | 483. Want of jurisdiction. |
| 478. — double-faced cause of action. | 484. Counterclaim not aided by
complaint. |
| 479. — counterclaim as on contract
by waiving tort. | |

§ 473. *Objection to sufficiency.*—The objection that an alleged counterclaim does not state facts sufficient to constitute a cause of action is ground of demurrer. But under a demurrer assigning only this ground, the objection that the claim is not available as a proper subject of counterclaim as against plaintiff's cause of action cannot be raised.

Safford vs. Snedeker, 67 *How. Pr. (N. Y.)*, 264.

§ 474. *Objections to availability.*—The objection that a counterclaim, irrespective of whether it be a sufficient cause of action, is not available as against plaintiff's cause of action, may be taken by demurrer;¹ but must be specially assigned.² Under a demurrer assigning only this ground, the objection that the facts are not sufficient to constitute a cause of action cannot be raised.³

¹ *Walker vs. Johnson*, 28 *Minn.*, 147; s. c., 9 *North West. Rep.*, 632, following *Ayres vs. O'Farrell*, 10 *Bosw.*, 143; *Hammond vs. Terry*, 3 *Lans.*, 186.

² *N. Y. Code Civ. Pro.*, § 496.

³ *Grange vs. Gilbert*, 10 *Civ. Pro. R. (N. Y.)*, 98.

§ 475. —*in actions for specific relief, etc.*—Under the New Procedure, where plaintiff only demands specific equitable relief,¹ or seeks to recover real² or personal³ property, defendant may set up as a counterclaim a de-

mand growing out of the same transaction, and tending in some way to diminish or defeat the plaintiff's recovery. A counterclaim consisting of a disconnected or independent demand, not tending to diminish or defeat plaintiff's recovery, cannot be pleaded in such cases.⁴

¹ *Grimes vs. Duzan*, 32 *Ind.*, 361; *Woodruff vs. Garner*, 27 *Ind.*, 4.

s. p., *Revere Fire Ins. Co. vs. Chamblorlin*, 56 *Iowa*, 508. *Eastmann vs. Linn*, 20 *Minn.*, 433. [Citing *Jarvis vs. Peck*, 19 *Wis.*, 74.]

s. p., *Davis vs. Davis*, 9 *Mont.*, 267. [Citing *Crary vs. Goodman*, 12 *N. Y.*, 266; *Dobson vs. Pearce*, *id.*, 156; *Bruck vs. Tucker*, 42 *Cal.*, 346.]

s. p., *Metropolitan Trust Co. vs. Tonawanda, etc., R. R. Co.*, 18 *Abb. N. C.*, 358; s. c., 43 *Hun*, 521; *Grange vs. Gilbert*, 44 *Hun*, 9.

s. p., *Jarvis vs. Peck*, 19 *Wis.*, 74.

² *Venable vs. Dutch*, 37 *Kan.*, 515.

s. p., *Cornelius vs. Kessel*, 58 *Wis.*, 237.

³ *Brown vs. Phillips*, 3 *Bush (Ky.)*, 656.

s. p., *Morgan vs. Spangler*, 20 *Ohio St.*, 38.

[Compare *Ward vs. Anderberg*, 36 *Minn.*, 300.]

⁴ *Standley vs. Northwestern Mut. L. Ins. Co.*, 95 *Ind.*, 254.

Burrage vs. Bonanza G. & S. M. Co., 12 *Oreg.*, 169.

Dietrich vs. Koch, 35 *Wis.*, 618.

Carpenter vs. Hewel, 67 *Cal.*, 589.

Williams vs. Irby, 15 *S. C.*, 458.

Mulberger vs. Koenig, 62 *Wis.*, 558; *Lawe vs. Hyde*, 39 *Wis.*, 345.

§ 476. — *in actions for money demands.*—*Counterclaim of specific relief.*—In an action where a money judgment is sought, defendant may seek specific relief as a counterclaim if his demand grows out of the same transaction and tends to diminish or defeat the plaintiff's recovery.

Marriott vs. Clise, 12 *Colo.*, 561.

Sigler vs. Hidy, 56 *Iowa*, 504.

Whitelock vs. Ledford, 82 *Ky.*, 390.

Knoblauch vs. Foglesong, 37 *Minn.*, 320.

Fouts vs. Mann, 15 *Neb.*, 172. [Citing *Smith vs. Fife*, 2 *Neb.*, 10; *Allen vs. Shackleton*, 15 *Ohio*, 145; *Goebel vs. Hough*, 26 *Minn.*, 252; *Orton vs. Noonan*, 30 *Wis.*, 611; *McArthur vs. Canal Co.*, 34 *id.*, 139; *Ainsworth vs. Bowen*, 9 *id.*, 348; *Norris vs. Thorpe*, 65 *Ind.*, 57.]
Moser vs. Cochrane, 13 *Daly*, 159; s. c., 21 *Weekly Dig.*, 545; aff'd in 107 *N. Y.*, 35.
Lazarus vs. Heilman, 11 *Abb. N. C.*, 93; s. c., 2 *Civ. Pro. R.* (Browne), 204. [Citing *Glen & Hall Mfg. Co. vs. Hall*, 61 *N. Y.*, 236.]

§ 477. — *contract and tort, etc.*—A cause of action on contract cannot be set up as a counterclaim in an action for tort.¹ Nor can a tort be set up as a counterclaim in an action on contract,² or for a tort,³ unless it arises out of the same transaction.⁴

Unconnected contracts and torts cannot be set off or counterclaimed in Equity; nor under the New Procedure in the exercise of the court's powers of an equitable nature; even though the plaintiff is insolvent.⁵

- ¹ *Grose vs. Dickerson*, 53 *Ind.*, 460.
Davis vs. Frederick, 6 *Mont.*, 300.
- Mairs vs. Manhattan Real Estate Assoc.*, 89 *N. Y.*, 498;
People vs. Dennison, 84 *id.*, 272, aff'g 8 *Abb. N. C.*, 128;
Baker vs. Platt, 17 *N. Y. State Rep.*, 180; s. c., 15 *Civ. Pro. R.*, 52.
- Scheunert vs. Kaehler*, 23 *Wis.*, 523; *Weatherby vs. Meiklejohn*, 56 *Wis.*, 73; *Ring vs. Odgen*, 45 *Wis.*, 303.
- ² *Richey vs. Bly*, 115 *Ind.*, 232. [Citing *Indianapolis R. R. Co. vs. Ballard*, 22 *Ind.*, 448; *Shelly vs. Vanarsdale*, 23 *Ind.*, 543; *Roback vs. Powell*, 36 *Ind.*, 515; *Harris vs. Rivers*, 53 *Ind.*, 216; *Boil vs. Simms*, 60 *Ind.*, 162; *Kieglmuller vs. Seamer*, 63 *Ind.*, 488.]
- Christy vs. Jones*, 39 *Kan.*, 183; *Carver vs. Shelly*, 17 *Kan.*, 472.
- Schmidt vs. Bickenbach*, 29 *Minn.*, 122.
- Brake vs. Corning*, 19 *Mo.*, 125.
- Wilkerson vs. Farnham*, 82 *Mo.*, 672.
- Collier vs. Ervin*, 3 *Mont.*, 142.
- Meeks vs. Berry*, 3 *N. Y. Supp.*, 840; s. c., 21 *State Rep.*, 248; *Thorpe vs. Philbin*, 22 *State Rep.*, 27; s. c., 3 *N. Y. Supp.*, 939; *Finkelmeier vs. Bates*, 48 *Super. Ct.*, 433;

Bell vs. Lesbini, 4 *Civ. Pro. R.*, 367; s. c., 66 *How. Pr.*, 385; *Hays vs. Moody*, 2 *N. Y. Supp.*, 385.

Goebel vs. Hough, 26 *Minn.*, 253.

Humbert vs. Brisbane, 25 *S. C.*, 506.

^a *Keller vs. The B. F. Goodrich Co.*, 117 *Ind.*, 561.

Allen vs. Coates, 29 *Minn.*, 46.

Heckman vs. Swartz, 55 *Wis.*, 173; *Noonan vs. Orton*, 30 *Wis.*, 356.

The Iowa Rev'd Code, § 2569 allows a counterclaim of any new matter constituting a cause of action in favor of defendant and against plaintiff. Under this provision contract and tort can be set up as a counterclaim against each other.

Campbell vs. Fox, 11 *Iowa*, 318; *Page vs. Sackett*, 69 *Iowa*, 226.

⁴ *Harris vs. Simpson*, 50 *Ark.*, 422; *Jones vs. Horn*, 51 *Ark.*, 19.

Tinsley vs. Tinsley, 15 *B. Mon. (Ky.)*, 454.

Ritchie vs. Hayward, 71 *Mo.*, 560.

Smith vs. Fife, 2 *Neb.*, 10.

Cass vs. Higenbotam, 100 *N. Y.*, 248; s. c., 8 *Civ. Pro. R.*, 329; *Carpenter vs. Manhattan Life Ins. Co.*, 93 *N. Y.*, 552, aff'g 2 *Hun*, 49; *Morris vs. Emmons*, 4 *State Rep.*, 882; *Weston vs. Turner*, 17 *id.*, 502; s. c., 1 *N. Y. Supp.*, 808; *Whitelegge vs. De Witt*, 12 *Daly*, 319; *Birch vs. Hall*, 3 *N. Y. Supp.*, 747; s. c., 19 *State Rep.*, 27.

s. p., *Vilas vs. Mason*, 25 *Wis.*, 310; *McArthur vs. G. B. & M. Canal Co.*, 34 *Wis.*, 139.

In States where the statute of set-off is limited to causes of action on contract in actions on contract, or to mutual debts, a set-off of course cannot be pleaded in an action of tort in any case, nor even a tort be pleaded as a set-off.

Matthews vs. Lindsay, 20 *Fla.*, 962; *Robinson vs. L'Engle*, 13 *Fla.*, 482, 499; *Dale vs. McGraw*, 71 *Mich.*, 106.

^a *Barnes vs. McMullins*, 78 *Mo.*, 260.

Duncan vs. Magette, 25 *Tex.*, 246; *Knight vs. Old*, 2 *Tex. App. Civ. Cas.*, § 78.

Zeile vs. Moritz, 1 *Utah*, 283.

Tallman vs. Barnes, 54 *Wis.*, 181.

In some States the right of set-off is confined to mutual debts, demands on contracts, etc.; and a tort cannot be set off, nor can a set-off be allowed, in an action for a tort.

Nelins vs. Hill, 85 *Ala.*, 583.

Hall & Co. vs. Penny, 13 *Fla.*, 621.

Lec vs. Rutledge, 51 *Md.*, 311

Pitts *vs.* Holmes, 64 *Mass.* (10 *Gray*), 92; Corey *vs.* Janes, 81 *Mass.* (15 *Cush.*), 543; Bartlett *vs.* Farrington, 120 *Mass.*, 284.
 Brazee *vs.* Bryant, 50 *Mich.*, 136; Ward *vs.* Willson, 3 *Mich.*, 1.
 Ahl *vs.* Rhoads, 84 *Pa. St.*, 319; Kitchen *vs.* Smith, 101 *Pa. St.*, 452.
 Hudson *vs.* Nute, 45 *Vt.*, 66.

§ 478. — *double-faced cause of action.*—If plaintiff's pleading states facts which might be regarded as enabling him to recover on contract or in tort, as the case might develop, defendant may interpose a counterclaim, as if the action were unequivocally on contract.

St. Louis, Ft. S. & W. R. R. Co. *vs.* Chenault, 36 *Kans.*, 51. (In an action by a railroad against its treasurer for appropriating the moneys of the company to his own use, the treasurer may set off his claims against the plaintiff founded on contract, for the payment of which the money had been taken. The plaintiff's cause of action in such a case will be regarded as upon contract for the purpose of allowing the set-off.)

§ 479. — *counterclaim as on contract by waiving tort.*—A defendant who has a right of action for tort such that he may waive the tort and recover on the contract implied by law, may do so by way of counterclaim, and it will avail as a claim on contract.

Fanson *vs.* Linsley, 20 *Kans.*, 235; Challis *vs.* Wylie, 35 *Kans.*, 506.
 Eversale *vs.* Moore, 3 *Bush (Ky.)*, 49.
 Fletcher *vs.* Harmon, 78 *Me.*, 465; Hopkins *vs.* Megguire, 35 *Me.*, 78.
 Webber *vs.* Howe, 36 *Mich.*, 150.
 Empire Transportation Co. *vs.* Boggiano, 52 *Mo.*, 294; Gordon *vs.* Bruner, 49 *Mo.*, 570.
 City Nat. B'k of Dallas *vs.* National Park B'k of N. Y., 32 *Hum.*, 105. [*Contra*, Mayor, etc., of N. Y. *vs.* Parker Vein Steamship Co., 8 *Bosw. (N. Y.)*, 300; s. c., 12 *Abb. Pr.*, 300.]

Nixon vs. McCrary, 101 *Pa. St.*, 289.

Bryce vs. Parker, 11 *S. C.*, 337.

Transportation Co. vs. Sweetzer, 25 *W. Va.*, 434.

§ 480. — *allegation of "same transaction."*—Where it is necessary to the availability of a counterclaim that it should have arisen out of the same transaction as the cause of action, a general allegation that it did so arise is not enough, but facts must be stated showing that it did.¹ And if such facts are stated, such a general allegation is not necessary.²

¹ Brown vs. Buckingham, 11 *Abb. Pr. (N. Y.)*, 387; s. c., 21 *How. Pr.*, 190; s. p., Green vs. Parsons, 14 *N. Y. State Rep.*, 97 and cas. cit.

² Gilpin vs. Wilson, 53 *Ind.*, 443.

§ 481. *Time of accrual or vesting.*—A counterclaim, the availability of which in the present action depends on the fact of its having accrued or become vested in the defendant before the action was commenced,¹ is bad on demurrer unless that fact is alleged.²

¹ This is not always the case, as for instance in an overpayment pending the suit. Howard vs. Johnston, 82 *N. Y.*, 271; and see Foulkes vs. Rhodes, 12 *Nev.*, 225; Beaver vs. Beaver, 23 *Pa. St.*, 167.

² Gregory vs. Gregory, 89 *Ind.*, 345.

Rumsey vs. Robinson, 58 *Iowa*, 225.

Rice vs. O'Connor, 10 *Abb. Pr. (N. Y.)*, 362. (An answer alleging that plaintiff "is indebted," and that the sum claimed "is now due," is insufficient.) s. p., May vs. Davidge, 44 *Hum (N. Y.)*, 342.

An answer setting up counterclaim may be liberally construed, to show that it accrued before action brought. Clift vs. Northrup, 6 *Lans. (N. Y.)*, 330.

§ 482. *Omission to ask affirmative relief.*—An answer is not bad on demurrer because the special use to

be made of the facts set out in the pleading was not correctly pointed out therein.

Dictum in *Chatfield vs. Simonson*, 92 *N. Y.*, 209, 217. [Citing *Emery vs. Pearse*, 20 *N. Y.*, 62; *Williams vs. Slote*, 70 *id.*, 601.]

s. p., *Wait vs. Ferguson*, 14 *Abb. Pr. (N. Y.)*, 379.

Ivey vs. Drake, 36 *Ark.*, 228. (Holding it error to sustain demurrer even though the answer failed to pray relief.)

[*Contra*, *Dawley vs. Brown*, 9 *Hun*, 461 [rev'd in 79 *N. Y.*, 390, on other grounds]. Here the Supreme Court held that an objection to the form of an answer in not containing any prayer for relief, even if that be a defect, must be taken by demurrier, and it is waived by going to trial upon an issue of fact.]

[It is to be observed that the counterclaim without a prayer for relief may be good as defensive plea, and if so is not wholly bad on demurrer; but according to the better opinion, not good as a foundation for an affirmative judgment against plaintiff for an excess over his claim, merely on default of reply.]

§ 483. *Want of jurisdiction*.—Want of jurisdiction over the subject-matter of the cause of action alleged as a counterclaim, is a ground of demurrer.¹

But this rule does not prevent the Court from applying its power to require a plaintiff to do equity as a condition of having equitable relief.²

¹ *Lyman vs. Stanton*, 40 *Kans.*, 727.

Cragin vs. Lovell, 88 *N. Y.*, 258; s. c., 2 *Civ. Pro. R.*, 128, rev'g 22 *Hun*, 101. s. p., *N. Y. Code Civ. Pro.*, § 495 (requiring it to be specially assigned).

² *Vail vs. Jones*, 31 *Ind.*, 467.

So also held of set-off of an unsettled account with decedent. *Lucore vs. Kramer*, 22 *Iowa*, 387.

§ 484. *Counterclaim not aided by complaint*.—A counterclaim¹ or cross-complaint,² as a ground for affirmative relief, must be complete in itself; and the omission to allege a fact necessary to make it out is not aided by any allegation of the complaint, unless it be so referred

to in the counterclaim as to adopt it in effect as a part thereof.³

¹ *Allen vs. Douglass*, 29 *Kans.*, 412. (BREWER, J. Ejectment: answer setting up claim on equitable grounds to have title quieted, but not alleging that plaintiff made an adverse claim.)

[So far as this case holds that the existence of the complaint making an adverse claim would not dispense with allegation and evidence that plaintiff made an adverse claim, it goes farther than reason or the present practice requires. See § 134.]

McCullom vs. City of Louisville, 7 *Ky. Law J.*, 665.

² *Kreichbaum vs. Melton*, 49 *Cal.*, 55.

Mercier vs. Lewis, 39 *Cal.*, 532. (Cross-bill against a co-defendant.)

³ *Cragin vs. Lovell*, 88 *N. Y.*, 258; s. c., *Civ. Pro. R.*, 128; rev'g 22 *Hun*, 101.

5. DEMURRER BY A CO-DEFENDANT.

§ 485. *Defendant cannot demur to co-defendant's answer.*—Allegations in an answer purporting to present a ground of affirmative relief against a co-defendant, but which cannot be properly considered as a part of the litigation presented by the complaint and the answers thereto, and are not relevant thereto, are not ground of demurrer on the part of the co-defendant against whom such relief is claimed.

Smith vs. Hilton, 50 *Hun*, 236, 242; s. c., 2 *N. Y. Supp.*, 820; 19 *State*, 340. (Holding that as they were not demurrable, a motion to strike out the allegation should be granted, but the demand of relief should not be struck out.)

[The reason is, not that the Court have not power to entertain a demurrer, but that demurrer is a dilatory proceeding, and should not be allowed to delay the proceeding to trial on the issues tendered by plaintiff.]

Compare Metropol. Trust Co. vs. Tonawanda, etc., R. Co., 18 *Abb. N. U.*, 368; s. c., 43 *Hun*, 521; aff'd, it seems, but without opinion, in 106 *N. Y.*, 673.

XV. DEMURRER TO REPLY.

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|-------------------------------------|--------------------------------------|
| § 486. Insufficiency. | § 491. Counterclaim against counter- |
| 487. Bad denial. | claim. |
| 488. Denial coupled with avoidance. | 492. Defendant may attack declara- |
| 489. Departure. | tion or complaint. |
| 490. Allegations in support of com- | 493. Demurrer to unauthorized |
| plaint, but without variance, | reply. |
| not a departure. | 494. Plaintiff may attack plea or |
| | answer. |

§ 486. *Insufficiency*.—A reply, whether to a defence or a counterclaim, which is insufficient in law upon the face thereof, is demurrable.¹ But the demurrer must state the objection substantially as indicated by the statute.²

[Whether this applies to mere denials, see § .]

¹ It was held in *Thomas vs. Loaners' Bank*, 38 *N. Y. Super. Ct.*, 466, that before the *N. Y. statute (N. Y. Code Civ. Pro., § 493)* expressly authorized this, a demurrer to a counterclaim could not be sustained; but the better opinion is that the Court does not need the authority of a statute to enable it to refuse to compel a party to go to trial on an insufficient pleading of his adversary. See p. 1 of this vol.

[*Croome vs. Craig*, 53 *Hun (N. Y.)*, 130; s. c., 25 *State Rep.*, 532, 6 *N. Y. Supp.* 136. (Held that a reply which alleges no new facts, but only repeats facts alleged in the answer or defence replied to, and claims that they avoid its effect, is bad on demurrer. But this can rarely if ever avail to sustain a demurrer to a reply, because the Court should give judgment against the bad answer. See § 461.)]

² *Peden vs. Mail*, 118 *Ind.*, 556; s. c., 20 *North East. Rep.*, 493. (Holding the statutory ground in Indiana, "that the facts therein stated are not sufficient to avoid the answer," is not sufficiently stated by saying that "the reply does not state facts sufficient to constitute a good reply to the defendant's answer, to which it is directed.") [Compare § , p. ; and *Wilson vs. Madison R. R. Co.*, 18 *Ind.*, 226, where the objection that the reply presented such a state of facts as showed

that plaintiff was not entitled to recover, seems to have been recognized. In *Hillenbrand vs. Stockman*, 123 *id.*, 598, it was held no error to sustain a demurrer to part of a reply, where the facts therein alleged might be proved under the general denial also contained in the reply.]

§ 487. *Bad denial*.—Where, as at common law, a replication is used to put in issue the allegations of a plea, a replication which merely gives an inconsistent version of the matter alleged in the plea, without denying defendant's version of it, is bad on demurrer.

United States vs. Buford, 3 *Pet. (U. S.)*, 12. [*Compare* §§ 463–465.]

§ 488. *Denial coupled with avoidance*.—Under the New Procedure, a reply is not bad, on demurrer, because it denies allegations of the answer setting up a counterclaim, and also contains new matter in avoidance.

DeValle vs. Navarro, 21 *Abb. N. C.*, 136.

§ 489. *Departure*.—A replication or reply departing from the original cause of action, is bad on demurrer.¹

A reply which sets up an additional cause of action or distinct ground of recovery, as in addition to that relied on in the original complaint,² or which contains allegations inconsistent with material allegations in the complaint,³ is a departure within this rule. But inconsistency with an immaterial allegation is not.⁴

¹ *Ennis vs. Case Mfg. Co. (C. C. E. D. Mo.)*, 30 *Fed. Rep.*, 487.

Sterns vs. Patterson, 14 *Johns.*, 132.

White vs. Joy, 11 *How. Pr.*, 36. [Rev'd, on the ground that the reply in this case was not a departure, in 13 *N. Y.*, 83.]

And at common law the demurrer may be either general or special. 1 *Chitt. Pl.*, 16 *Am. ed.*, 678*.

² So held in effect on motion to strike out *Cohn vs. Husson*, 66 *How. Pr.*, 150. [But whether demurrer is the remedy, see § .]

McAroy vs. Wright, 25 *Ind.*, 22. (Complaint by buyer against seller for inducing him to buy damaged goods without examination. Reply, alleging examination in ignorance of fact that the condition involved damage, and that defendant fraudulently concealed the fact; and that he afterwards promised to pay the damages. *Held bad*, as a departure.)

Compare Brown vs. First Natl. Bk., 115 *Ind.*, 572. (Complaint by assignee on notes. Answer: fraud of payee in obtaining them, and want of consideration. Reply: that defendant, after assignment to plaintiff and before maturity, obtained from him an extension of time on a promise to pay them. *Held*, an avoidance of the answer, and not a departure.)

Whether a counterclaim to a counterclaim can be pleaded, compare *Blount vs. Rick*, 107 *Ind.*, 238; s.c., 4 *West.*, 467, holding that as the counterclaim could be interposed if defendant had brought a separate action on his cross-demand, there is no good reason why it cannot be interposed when he sets it up by set-off in the nature of cross-complaint.

[A mere set-off can be interposed against a counterclaim, under the New York practice, without pleading it; the rule in the case above stated being confined to a "counterclaim," strictly so called, that is, a demand on which an affirmative judgment is required.]

In *Mount vs. L. & N. R. R., Co.* (1881), 2 *Ky. Law Rep.*, 221. (A carrier was sued for the value of a mule killed in transportation. The answer set up a counterclaim for the freight agreed upon. This, the second paragraph of the reply met by alleging injuries to other mules shipped at the same time. *Held* demurrable. Plaintiff having but a single cause of action, could not divide it and set up a new complaint in a reply, or allege therein an additional breach of the contract by way of counterclaim.)

³ *National Bank of Stanford vs. Reed, etc.* (*Ct. App. Ky.*, 1882), 4 *Ky. Law Rep.*, 346. (Inconsistency between allegation of reply, and allegation in a petition in a former suit which plaintiff had made a part of his petition in this suit by annexing and referring to it, *held* a departure.)

⁴ 1 *Chitt. Pl.*, 16 *Am. ed.*, 674.*

§ 490.—*allegations in support of complaint, but without variance, not a departure.*—It is not a departure to set up new matter not constituting another cause of action or ground of recovery and not inconsistent with the allegations of the complaint, but only going to support them by alleging a waiver in the nature of an equitable estoppel precluding defendant from relying on the defence he has alleged.

Odd Fellows' Mut. Aid Asso. *vs.* Sweetzer (*Ind.*, 1889), 18 *Ins. L. J.*, 289; s. c., 19 *North East. Rep.*, 722. (Holding that a reply which sets up a waiver of prompt payment of assessments is not open to objection on demurrer as a departure. Citing *Fanning vs. Insurance Co.*, 37 *Ohio St.*, 344.)

[See also note 2 under last section.]

§ 491. *Counterclaim against counterclaim.*—In those States in which a matter set up as a counterclaim or set-off is regarded as in the nature of a cross-action, plaintiff may plead by way of replication a set-off to the counterclaim.¹

It is sufficient in such case that the demand so set up was due the plaintiff at the time the defendant pleaded his set-off or counterclaim.²

¹ *Peden vs. Mail*, 118 *Ind.*, 556. (Action for work and labor, and on contract of partnership in farming. Plea of set-off. Replication of set-off. *Held*, a set-off may be pleaded to a set-off.)

Blount vs. Rick, 107 *Ind.*, 238, 240. (Suit on note. Set-off. Reply of set-off. *Held*, proper to overrule demurrer to reply. One, having a note and an account against another, may sue upon the note and reply the account as a set-off against an equal amount pleaded as a set-off. Citing *House vs. McKinney*, 54 *Ind.*, 240; *Turner vs. Simpson*, 12 *Ind.*, 413; *Reilly vs. Rucker*, 16 *Ind.*, 303; *Curran vs. Curran*, 40 *Ind.*, 473; *Rev. Stats.*, § 367.)

Cox vs. Jordan, 86 *Ill.*, 560. (Distress warrant for rent. Plea of set-off. Declaration in *assumpsit* on other claims against defendant, as a replication, and defendant's plea of general issue, ordered stricken from the files, and judgment for excess for defendant. *Held*, erroneous. Plea of set-off by defendant is a cross-

action, and stands for his declaration; and as to that cross-action, plaintiff in the original action is a defendant, and may avail himself of the statute allowing a plea of set-off. His replication of set-off to counterclaim of defendant was available, but only as a defence. Reversed.)

Galligan vs. Fannan, 91 *Mass* (9 *Allen*), 192. (It is allowable for plaintiff to file a set-off in reply to a set-off on which defendant relies.)

Hill vs. Roberts, 86 *Ala.*, 523. (Action on note. Plea of set-off. Charge of Court excepted to. *Held*, a plea of set-off of an account for moneys collected by plaintiff for defendant may be resisted by plaintiff's showing, under a special replication, that those moneys were applied by agreement, or by direction of defendant, to the payment of another claim held by plaintiff against him; such an application is not made by the law, in absence of action by parties; and a charge authorizing the jury to set off the claim other than the one on which defendant was sued against his set-off, was error. Reversed and remanded.)

* *Blount vs. Rick*, 107 *Ind.*, 238, 245. (Suit on note. Set-off. Reply of set-off. In petition for rehearing, question of right to reply as set-off a claim not held when suit was commenced having been pressed, it was *held*, that plaintiff could reply to a set-off pleaded any claim existing against defendant at the time he filed his plea. A plea of set-off is in its nature a cross-action;—citing *Kennedy vs. Richardson*, 70 *Ind.*, 524; *Boil vs. Simms*, 60 *Ind.*, 162; *Mullendore vs. Scott*, 45 *Ind.*, 113; *Ewing vs. Patterson*, 35 *Ind.*, 326; *Shoemaker vs. Smith*, 74 *Ind.*, 71; *Davidson vs. Remington* 12 *How. Pr.*, 310;—and its filing the commencement of the action. As to right to file reply, see *Rev. Stats.*, §§ 347, 348, 367. Petition overruled.)

Mortland vs. Holton, 44 *Mo.*, 58. (In an action against several defendants upon a contract which by statutory construction was joint and several, the plaintiff, in reply to a counterclaim of one of the defendants of a debt due him individually, set up a claim against such defendant as an offset. *Held*, that the reply did not set up a new cause of action; it only barred the counterclaim.)

Dawson vs. Dillon, 26 *Mo.*, 395. (A plaintiff cannot set up, by the way of defence to set-off, a demand against defendant that he might have included in his petition.)

New York Code of Civ. Pro. § 514, providing that a reply may contain a general or specific denial, or new matter constituting a defence to the counterclaim, does not

authorize the setting up of an independent counterclaim in the reply. *Cohn vs. Husson*, 66 *How. Pr.*, 150; *Hatfield vs. Todd*, 13 *N. Y. Civ. Pro. R.*, 265; *White vs. Joy*, 13 *N. Y.*, 83-90. *Contra*, *Miller vs. Lasee*, 9 *How. Pr.*, 356. If a counterclaim is so pleaded, the objection should be taken by a motion to strike out and not by demurrer. *Hatfield vs. Todd* (above), *N. Y. Code Civ. Pro.*, § 493.

§ 492. *Defendant may attack declaration or complaint.*—On demurrer to a reply or replication, the demurrant may attack the complaint or declaration.

People, Weber vs. Spring Valley, 129 *Ill.*, 169; s. c., 21 *North East. Rep.*, 843. (Information.)

Chestnut vs. Chestnut, 77 *Ill.*, 346. (Scire facias.)

Compare Gilbert vs. Bakes, 106 *Ind.*, 558; s. c., 7 *North East. Rep.*, 257. (*It seems* that where the answer of the defendant is held good on demurrer, a demurrer to the reply will not be carried back to the complaint by the Court, of its own motion.)

After defendants have pleaded the general issue to the whole declaration, they cannot, on demurrer to the replication, object to the declaration. *Wheeler vs. Curtis*, 11 *Wend.*, 653.

Whether the waiver of special grounds of demurrer, by not interposing a demurrer, precludes the party from interposing the objection when his adversary demurs, see §§ 461, 462.

[For other restrictions on the principle that a demurrer searches the previous record, see § —, *Demurrer to Answer*.]

§ 493. *Demurrer to unauthorized reply.*—Where a plaintiff voluntarily serves a reply in a case where it is neither required by law nor directed by the Court, the Court will not consider its sufficiency upon demurrer thereto.

Avery vs. N. Y. Central, etc., R. R. Co., 6 *N. Y. Supp.*, 547. (Holding that the demurrer should be set aside as unauthorized.)

[This case can hardly be regarded as holding it error for the Court to refuse to entertain a demurrer to an

insufficient reply in such a case, for the Court is never bound to require a party to go to trial on an insufficient pleading of his adversary ; but the ruling may be sustained on the ground that it is discretionary with the Court to leave the party to his motion ; and that the general term can revise the exercise of discretion by the special term on this point.]

§ 494. *Plaintiff may attack plea or answer.*—On demurrer to a reply or replication, plaintiff may attack the defence to which the replication or reply was addressed.¹

The omission to demur to such defence is not a waiver of the objection, such as to preclude its being raised on a hearing of the subsequent demurrer interposed by the adverse party.²

¹ *Schalucky vs. Field (Ill.)*, 14 *West. Rep.*, 578, 16 *North East. Rep.*, 904.

Cupp vs. Campbell (Ind., 1885), 1 *West Rep.*, 255. (Holding that it is not error to overrule a demurrer to reply, if the answer replied to was insufficient.)

Peck vs. Cheney, 4 *Wisc.*, 249.

² *Menifee vs. Clark*, 35 *Ind.*, 304.

[For some restrictions on this rule see § —, *Demurrer to Answer.*]

XVI. DEMURRER TO SUPPLEMENTAL PLEADINGS.

1. To SUPPLEMENTAL COMPLAINT.

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|---------------------------------------------------------|-----------------------------------------|
| § 495. Facts which occurred before suit commenced. | § 497. Curing defect of parties. |
| 496. Facts subsequent but essential to cause of action. | 498. Facts merely additional. |
| | 499. Unnecessary rehearsal of original. |

2. To SUPPLEMENTAL ANSWER.

- | | |
|---------------------------------------------------|------------------------------------------|
| § 500. Demurrer lies. | § 503. Right of new party to answer. |
| 501. Defence arising after suit, in legal action. | 504. Leave to plead need not be alleged. |
| 502. — in equitable action. | 505. Demand of relief. |

1. To SUPPLEMENTAL COMPLAINT.

§ 495. *Facts which occurred before suit commenced.*— In Equity, a supplemental bill is demurrable if it appears upon its face that all the matters alleged therein occurred before the suit was commenced, and might have been stated in the original complaint by amendment.¹

But under the New York Code a supplemental pleading may allege any material facts which occurred after the former pleading of the party, or of which he was ignorant when it was made.²

Hence a complaint alleging only material facts which occurred before suit, or before the former pleading, is not therefor demurrable if it also appear that the party was ignorant of them when the former pleading was made.

¹ *Stafford vs. Howlett*, 1 *Paige* (N. Y.), 200.

Fulton Bank vs. N. Y. & Sharon Canal Co., 4 *Paige*

(*N. Y.*), 127, 132. (Holding that objection must be made by demurrer, plea, or answer, and therefore the objection is too late for the first time at the hearing.)

² *N. Y. Code of Civ. Pro.*, § 544.

§ 496. *Facts subsequent but essential to cause of action.*

—A supplemental complaint is demurrable as insufficient,¹ if a fact alleged in it, because essential to make out the original cause of action,² and not merely formal,³ is alleged as having occurred since the commencement of the action. It is not demurrable, if it sufficiently alleges facts which have occurred pending the suit, and which vary the relief to which the plaintiff is shown to be entitled by the original complaint;⁴ or which show another ground for the same relief.⁵

¹ See, for instance, *Kelsey vs. Jewett*, 34 *Hun* (*N. Y.*), 11.

A demurrer was held not frivolous in *J. G. Hoffman Manufacturing Co. vs. Read*, *Supm. Ct. Sp. T.*, 1885, 8 *N. Y. Civ. Pro. R.*, 277. The objection, on which it was attacked as frivolous, was that it did not show the nature of the cause of action, nor show that the cause of action survived the death of the original plaintiff. Demurrers have been sometimes overruled on the ground that the statute does not expressly authorize them. But see p. 1, and notes, and *N. Y. Code Civ. Pro.*, § 217.

² *Pinch vs. Anthony*, 10 *Allen* (*Mass.*), 470, 477. (But holding that failing to demur and going into a hearing on the merits without objecting, waives the objection.)

Lowry vs. Harris, 12 *Minn.* 255.

s. p., *McCullough vs. Colby*, 4 *Bosw.* (*N. Y.*), 603; again, 5 *id.*, 477. (Issue of an execution pending a creditor's action instead of before commencing it.)

³ This exception at least was recognized in equity, 3 *Dan. Ch.*, 1657, and there is no reason why the Code should be deemed to have changed the rule in equity cases.

⁴ *Hasbrouck vs. Shuster*, 4 *Barb.* (*N. Y.*), 285.

s. p., *Yorkshire Ry. Wagon Co. vs. Cornwall Minerals Ry. Co.*, *Ch. Div.*, June, 1882, *KAY, J.* (Suit to enjoin lessee from parting with possession. Pending the action the lease terminated entitling plaintiff to resume possession

subject to an unexercised option to purchase. *Held*, that plaintiffs might amend by asking delivery of possession.)

Allen vs. Taylor, 2 *Green Ch. (N. J.)*, 435. (Bill by mortgagee against mortgagor for waste; pending the suit the mortgage became due and the mortgagee made default. *Held*, that a supplemental bill for foreclosure was sustainable.)

[For other cases see *Marquis of Waterford vs. Knight*, 9 *Bligh (N. S.)*, 307; s. c., 3 *Cl. & F.*, 270; *Veazie vs. Williams*, 3 *Story*, 54; *Salisbury vs. Hatcher*, 2 *Yon. & Coll.*, 54; s. c., 12 *L. J. (N. S.)*, *Ch.*, 68; s. c., 6 *Jur.*, 1051; *Bardwell vs. Ames*, 22 *Pick. (Mass.)*, 375; *Saunders vs. Frost*, 5 *id.*, 275; *Williams vs. Birbeck*, *Hoffm. (N. Y.)*, 359; *Candler vs. Pettit*, 1 *Paige (N. Y.)*, 168.]

* *Jenkins vs. International Bank of Chicago*, 127 *U. S.*, 484; s. c., 32 *Law. Ed.*, 189. (Foreclosure. Pending the suit plaintiff set up by supplemental bill a judgment he had recovered meanwhile. *Held*, proper. Strictly new matter arising after the filing of a bill, properly set up by way of supplemental bill, in support of the relief originally prayed for, cannot be considered as a new cause of action. The Statute of Limitations has no application to such supplemental bill.)

s. p., *Cohn vs. Husson*, 5 *N. Y. Civ. Pro. R.*, 324. (Action on note. Answer that defendant had given a renewal note which was outstanding. Supplemental complaint stating that the renewal note was not paid, and was in plaintiff's possession, *held* proper, and plaintiff might return it at the trial.)

[All these questions now usually come up on motion for leave.]

§ 497. *Curing defect of parties.*—To cure a defect of parties, the plaintiff may be allowed to set up by supplemental complaint a fact which has occurred since the commencement of the action and which dispenses with the necessity of joining the absent party.

Nolan vs. Command, 11 *N. Y. Civ. Pro. R.*, 295. (Partition by alien, omitting to join the State. *Held*, that the filing of a declaration under the statute, since the commencement of the action, which would prevent the State from claiming an escheat, might be so set up.)

§ 498. *Facts merely additional*.—A supplemental complaint is not demurrable for insufficiency, if it simply alleges facts which occurred since the commencement of the action, and which it is necessary to allege to continue the action by, or against, one not originally a party.

Simmons vs. Lindley, 108 *Ind.*, 297; s. c., 9 *North East. Rep.*, 360; 6 *West. Rep.*, 581 (ejectment); *Peters vs. Banta*, 120 *Ind.* 416; s. c., 22 *North East. Rep.*, 95; *Frericks vs. Coster*, 22 *Fed. Rep.* 637; s. c., 17 *Reporter*, 168 (*U. S. Circ. Ct.*); *Spier vs. Robinson*, 9 *How. Pr. (N. Y.)*, 325, 329 (specific performance).

s. p., *American Life Ins. & Trust Co. vs. Sackett*, 1 *Barb. Ch. (N. Y.)*, 585. (Holding that where the only allegations of a supplemental bill are those necessary to continue the action by or against one succeeding to the interest of an original party, the answer thereto can only put in issue those allegations, or allege matter of defence which has occurred since the suit was commenced.)

§ 499. *Unnecessary rehearsal of original*.—A supplemental bill, which unnecessarily sets forth at length allegations of the original bill, is not demurrable for insufficiency, merely because of the insufficiency of the allegations thus rehearsed, if, as a whole, it is sufficient.

Johnson vs. Snyder, 7 *How. Pr. (N. Y.)*, 395.

2. TO SUPPLEMENTAL ANSWER.

§ 500. *Demurrer lies*.—Under the New Procedure a supplemental answer which does not state facts sufficient to constitute a defence in whole or in part, is demurrable.

Goddard v. Benson, 15 *Abb. Pr. (N. Y.)*, 191. (Where the Code allows a supplemental answer, it necessarily allows what is incident to such a pleading, the right to demur to it. This was the rule before the code, where a plea was put in *pais darrein*. Citing *Abbot vs. Rugerly*. *Freem.* 252.)

s. P., *Lee vs. Dozier*, 40 *Miss.*, 477; *Swan vs. Dent*, 2 *Md. Ch.* 111 (on exceptions).

§ 502. *Defence arising after suit, in legal action.*—In an action of a legal nature, the rights of the parties must be determined as they existed at the commencement of the action, except so far as the situation has since been changed unfavorably to the plaintiff's claim, either by his own act or by operation of law.¹

[The reason is that in legal actions the statute gives costs; and as they ought not to be charged on a plaintiff who had good reason to sue, defendant ought to get leave, and then the court can impose terms.]

Hence (with those exceptions) an answer which sets up in defence any essential fact that did not occur till after suit brought, is bad in an action of a legal nature, even in those jurisdictions where equitable defences may be pleaded.²

But if plaintiff's own voluntary act pending the suit has impaired or discharged his cause of action, as by a compromise or release,³ or has given defendant a counter-claim arising out of the same subject-matter,⁴ or if the defendant has been exonerated by operation of law, as by a discharge in bankruptcy or an adjudication in another suit,⁵ defendant may set up the fact in his answer, unless it occurred after issue joined, in which case it can only be set up by supplemental answer.⁶

¹ *Wisner vs. Ocumpaugh*, 71 *N. Y.* 113. (The Court say: "The rights of the parties must be determined at the commencement of the action. Although equitable defence is allowable to a legal action, it does not, when interposed, change the character of the action, nor authorize transactions subsequent to the commencement of the action to be shown, to affect the rights of the parties, as they existed when it commenced.")

² *Id.*

³ *Willis vs. Chipp*, 9 *How. Pr. (N. Y.)*, 568. (Motion for judg-

ment for frivolousness denied because defendant had a right to plead settlement with plaintiff after suit brought.)

Lansing vs. Ensign, 62 *id.* 363. (Settlement, payment and waiver, pending suit, *held* not immaterial, and motion for judgment on the pleadings denied.)

Otherwise of payment to plaintiff's creditor by defendant, even though pursuant to and as a performance of the contract sued on. *Moffatt vs. Henderson*, 48 *N. Y. Super. Ct. (J. & S.)*, 449.

The fact that plaintiff's right of action was divested after commencement of the action, by his bankruptcy, is not an available defence, if before it is pleaded he re-acquires it by purchase from his assignee. *Gear vs. Fitch*, 16 *Pat. Off. Gaz.*, 1231.

* *Kelley vs. Dee*, 2 *N. Y. Supm. Ct. (T. & C.)*, 286. (Action for work and labor. When the parties were about to go before the referee they came to a settlement, which plaintiff afterwards refused to carry out, though defendant tendered performance. After the hearing was begun, defendant, by leave, filed a supplemental answer setting up the settlement of the action and asking specific performance. *Held*, that the agreement, accompanied by tender of performance, constituted a good cause of action in equity for specific performance, and, under the Code, defendant is entitled to set it up as a defence. Judgment for plaintiff therefore reversed.)

s. P., *Cass vs. Higenbotam*, 100 *N. Y.*, 248.

* s. P., *Yeaton vs. Lynn*, 5 *Pet. (U. S.)*, 224, 231. (MARSHALL, Ch. J. Common-law action by executor. Revocation of letters pending suit might be pleaded *puis darrein continuance*.)

The statement that the matter is pleaded "to the further maintenance of the action" is matter of form rather than of substance. *Carpenter vs. Bell*, 19 *Abb. Pr. (N. Y.)*, 258, 263. BOSWORTH, Ch. J.

* *Matthews vs. Chicopee Mfg. Co.*, 3 *Robt. (N. Y.)*, 711. (Release after issue in an action against joint tort feorsors should be set up by supplemental answer. Denying motion to amend answer, on the ground that it should have been for leave to serve supplemental answer.)

§ 502. *Defence arising after suit, in equitable action.*

An action of an equitable nature cannot be maintained, any more than a legal action, unless the cause of action existed at the commencement of the suit; but in an

action of an equitable nature, any matter of defence, though arising after suit brought, may be pleaded in the answer,¹ unless the time for answering has passed, in which case it may, by leave, be pleaded in a supplemental answer.²

[The reason is that here the costs are discretionary; and if defendant prevails, notwithstanding there was good cause to sue, the Court can charge him with costs.]

¹ *Lyons vs. Brooks*, 2 *Edw. Ch. (N. Y.)*, 110. (Agreement, and payment made, subsequent to the filing of the bill.)

Peck vs. Goodberlet, 109 *N. Y.*, 180, 189; s. c., 15 *N. Y. State Rep.*, 182. (Holding that the rule in actions at law, that the right to judgment depends on facts existing at the commencement of the action, is not the rule in actions in equity.)

s. p., *Trustees of Columbia Col. vs. Thacher*, 87 *N. Y.*, 311.

² *Wilbur vs. Gold & Stock Tel. Co.*, 52 *N. Y. Super. Ct. (J. & S.)*, 189. (Specific performance. *Held*, error to refuse to allow defendants to serve a supplemental answer setting up facts occurring after the commencement of the action, which show that they are unable to specifically perform.)

Medbury vs. Swan, 46 *N. Y.*, 202. (The Court say that "generally a defendant has a right to set up, by a supplemental answer, matter of defence which has occurred or come to his knowledge subsequently to the putting in of his first answer, but that he must apply to the Court, by motion, for leave so to do, so that the opposite party may be heard, and the Court may determine whether there has been inexcusable laches, or whether any of the reasons appear which are recognized as giving authority for denying the exercise of the general right in the particular instance; and the Court must grant leave, unless the motion papers show a case in which the Court may exercise a discretion as to granting or withholding leave.")

Fox vs. Kimberly, 27 *Conn.*, 307, 315. (Dictum that therefore a bill in equity to enjoin prosecution after settlement is not sustainable.) [*Compare* *Giles vs. Austin*, 62 *N. Y.*, 486; aff'g 38 *N. Y. Super. Ct. (J. & S.)*, 215, holding that defendant might resort to a new action, because in that case leave to serve a supplemental answer would have been discretionary, and not a matter of right.]

§ 503. *Right of new party to answer.*—One who ought to have been made an original party may, when brought in by amendment or supplemental complaint, set up any defence which he might have set up had he originally been made a party at the time the action was commenced, as well as any which has since arisen.¹

But a party who is made such pending the suit, as representing the interest of one who was an original party, has no other right of defence than the one for whom he substituted, and is bound by the pleadings of his predecessor, except as may be otherwise expressly permitted by the Court.²

¹ *Campbell vs. Bowne*, 5 *Paige* (N. Y.), 34; *Shaw vs. Cock*, 78 N. Y., 194; *Lawrence vs. Ballou*, 50 *Cal.*, 258; *Newman vs. Marvin*, 12 *Hun* (N. Y.), 236. (Limitations.)

² *Forbes vs. Waller*, 25 N. Y., 430, 435; *Fretz vs. Stover*, 22 *Wall.* (U. S.), 198.

The service of a supplemental complaint is not the commencement of a new action, but is only a continuance of the existing action, and under the new procedure, which requires a continuance on motion to be sought within a year, and which also allows the living party to require a prompt continuance by moving for it within a time therefor limited, a defendant on whom a supplemental complaint by an executor or administrator is served, cannot, at least in an action of a legal nature, plead the statute of limitations, unless it had run before the action was originally commenced. The fact that the statute time has elapsed since the action was commenced, is an objection to the continuance available only on the motion to permit or require the supplemental complaint to be made. *Evans vs. Cleveland*, 72 N. Y., 486; rev'g 12 *Hun*, 140.

§ 504. *Leave to plead need not be alleged.*—A plea or answer, duly interposed before issue otherwise joined, need not allege leave of court, although the fact pleaded occurred after the suit brought.

Whiting vs. Burger (78 *Me.*, 287), 4 *Atl. Rep.*, 694, 696.

§ 505. *Demand of relief*.—Under the Code of Procedure, an answer setting up payment after suit brought is not fatally defective because it demands that the complaint be dismissed, and judgment granted for costs, instead of praying judgment whether plaintiff should further maintain his action, as under the old practice. No formal conclusion is required, and no judgment or relief is required to be prayed for, except when defendant asks affirmative relief.

Bendit *vs.* Annesley, 42 *Barb.* (N. Y.), 192; s. c., 27 *How. Pr.* (N. Y.), 184.
 S. P., Carpenter *vs.* Bell, 19 *Abb. Pr.* (N. Y.), 258, 263.

ISSUES OF FACT.

I.—GENERAL RULES FOR DEFINING THE LIMITS OF THE ISSUE.

[To avoid repetition I here state together those general rules for deciding a controversy as to whether a matter is in issue or not, which are important, in determining the mode and method of trial, in the reception of evidence, and on motions to dismiss or nonsuit, and requests for instructions or findings. But the progress of the trial modifies the application of such rules at those successive stages, and the modifications peculiar to each stage are noticed in their appropriate places under subsequent divisions.]

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|--------------------------------------------------------------|--------------------------------------------------------------------------------------|
| 1. DUTY OF THE COURT, §§ 506, 507. | 8. ADMISSIONS, AND THE SHIFTING OF BURDEN OF PROOF BY UNVERIFIED DENIAL, §§ 615-636. |
| 2. WHAT SYSTEM OF LAW APPLIES, §§ 508-510. | 9. STATUTORY TRAVERSE OF ANSWERS AND REPLIES, §§ 637-641. |
| 3. WHAT PLEADINGS CONSTITUTE THE ISSUE, §§ 511-532. | 10. INCONSISTENCY IN PLEADING, §§ 642-649. |
| 4. WHAT KIND OF ALLEGATIONS TENDER AN ISSUE, §§ 533-549. | 11. AIDER, §§ 650-656. |
| 5. EXPRESS ADMISSIONS, §§ 550-560. | 12. DEPARTURE, §§ 657, 658. |
| 6. ADMISSIONS BY NOT DENYING, §§ 561-570. | 13. WAIVER BY PLEADING OR NOT PLEADING, §§ 659-661. |
| 7. FORM OF DENIAL; AND ADMISSIONS BY BAD DENIAL, §§ 571-614. | 14. ISSUES BETWEEN CO-DEFENDANTS, §§ 662-670. |

1. DUTY OF THE COURT.

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| § 506. Limits of the issue to be decided by the Court. | § 507. Refusal to try immaterial issue. |
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§ 506. *Limits of the issue to be decided by the Court.*—It is the duty of the Court, whenever necessary for determining an offer, motion, or objection by either party, as

to the proper course of the trial, to ascertain and define, so far as that necessity requires, what allegations are and what are not material, and what is and what is not in issue upon the pleadings.

Lax rule.—Under an ill-defined issue the Court should, in case of doubt, receive offered evidence, subject to its being afterwards stricken out, or the jury instructed to disregard it if justice so require it.

Harris vs. Holmes, 30 *W.*, 352, 355. (Assumpsit on an account for advertising. The Court say: "We have to allow a wide range in the admissibility of evidence, in the trial of cases where the issue is not defined, and where, of course, at the time, it is often impossible to anticipate what questions may arise in the course of the trial. The rule in such cases is that the testimony should be received, if it is competent evidence in any view of the case which may be thereafter taken. And a new trial is not to be granted on account of the admission of evidence which might have become important in any supposable state of the other evidence, or upon any question which might probably thereafter arise, unless it appear that it was improperly applied in the decision of the case," etc. "But the useful and practical method, and the one now more commonly practised upon, is to reserve the questions upon the application of the evidence to the determination of the case.")

Strict rule.—The better rule is that in such case the Court should determine the question absolutely in the first instance, according to a reasonable construction of the pleadings; for the party whose evidence is excluded may immediately apply to amend.

Estate of Brooks, 54 *Cal.*, 471.

See also *Abb. Civ. Jury Brief*, 57-59; 8 *Abb. N. Y. Dig.*, 2d vol. of Supp., 681.

§ 507. *Refusal to try immaterial issue.*—If an issue raised by the pleading is wholly immaterial to the cause of action or defence, the Court, even of its own motion, may refuse to try it.

Corning vs. Corning, 6 *N. Y.*, 97. (Assault and battery. Reply to allegations in answer relied on as provocation.) *N. Y. Code Civ. Pro.*, § 975.

2. WHAT SYSTEM OF LAW APPLIES.

§ 508. Cause removed.

§ 510. Some Equity Rules same as at

509. State practice in U. S. Court.

Law.

§ 508. *Cause removed*.—If the issue has been properly joined in the Court where the action is commenced, its removal to another Court of the same State for trial does not necessarily impair the issue by reason of more stringent rules of pleading applicable in the latter Court.¹

It is the better opinion that the latter Court has power to amend the issues, as if the cause originated before it.²

If not, the objection is waived by going to trial on the amended issue.³

¹ *Richardson vs. Cato*, 9 *Humph. (Tenn.)*, 464. (Sworn denial of written instrument.) [Otherwise on removal of an equity cause to the Federal court.]

² See *Lalleman vs. Fere*, 18 *Abb. N. C.*, 56.

³ First Natl. Bk. of *Madison vs. Carson* (*Neb.*, 1890), 46 *North West. Rep.*, 276.

§ 509. *State Practice in U. S. Court*.—The State practice as to what constitutes an issue, and whether an allegation or admission in one cause of action or defence aids or mars matter in another cause of action or defence, applies in the United States Circuit and District Court sitting in the same State,¹ in civil causes other than in equity, admiralty,² and *in rem* for forfeiture.³

Exceptions to this rule are recognized in respect to waiver of a defence in abatement by a defence on the merits,⁴ and allegations of jurisdictional facts peculiar to Federal courts.⁵

¹ *Northern Pacif. R. vs. Paine*, 119 *U. S.*, 561. (*Aider*, etc.)
Iron Mountain Ry. vs. Knight, 122 *U. S.*, 79, 96. (Statutes requiring sworn denials.)

s. p., *Bell vs. Mayor, etc. of Vicksburg*, 23 *How. (U. S.)*, 443.

As to rules of court see dictum in *Osborne vs. City of Detroit*, 28 *Fed. Rep.*, 385, 387.

² *U. S. R. S.*, § 914.

³ *Coffey vs. United States*, 117 *U. S.*, 233.

⁴ See §§ 659–661, Waiver by Pleading.

⁵ See §§ 571–614, Denials.

§ 510. *Some Equity Rules same as at Law.*—The rules, that the burden of proof rests upon the party who holds the affirmative of the proposition to be proved, that the evidence must be limited to the issues raised by the pleadings, and as to the effect of a variance between the proof and allegations, are the same in equity as in suits at common law.

Aldrich Eq. Pl. & Pr., 169.

As to these rules see *Civil Jury Brief*, pp., 84, 85.

3. WHAT PLEADINGS CONSTITUTE THE ISSUE.

§ 511. Question as to service.

512. Question as to filing.

513. Withdrawal of part of pleading.

514. Amended supersedes original.

515. — unless both are answered as one.

516. Omission to designate.

517. Omission to amend responsive pleading.

518. Delay to respond.

519. Demurrer overruled.

520. Demurrer sustained.

521. Judgment on plea in abatement.

522. Substitute for lost pleading.

§ 523. Substituted party.

524. Stipulations, as to character of pleading.

525. — for trial on the merits.

526. Stipulation modifying the issue.

527. Stipulation repugnant to the pleading.

528. Power of counsel.

529. Executory stipulation for amendment.

530. Amending to get rid of concession.

531. Denial lets in different version.

532. Striking out.

§ 511. *Question as to service.*—Where the copy of pleadings furnished to the Court at the trial¹ contains a pleading against a party who denies that it was served, it is within the discretion of the Court whether to receive

proof that it was not served, or to leave the party to his remedy by motion after trial.²

¹ *N. Y. Gen. Rules*, No. 20, requires them to be marked showing what is in issue.

² *Miller vs. Barber*, 66 *N. Y.*, 558, 564, aff'g 4 *Hun*, 802.

§ 512. *Question as to filing*.—Unless a statute or rule of Court otherwise provides,¹ a pleading duly delivered to the clerk at his office with request to file, the fee if any being paid or tendered, is deemed filed, notwithstanding the clerk's neglect to mark or place it.

Love vs. McIntyre, 3 *Tex.*, 10. (Compare, however, as to file-marking, *nunc pro tunc*, 1 *Abb. New Pr. and F.*, 91.)

§ 513. *Withdrawal of part of pleading*.—A count, cause of action, or defence, abandoned or withdrawn, remains a part of the record, so far as necessary for the purpose of express reference contained in other parts of the same pleading.

Jones vs. Vanzandt (*U. S. Cir. Ct.*), 5 *McLean*, 214. (Count in declaration at common law.)

[For other cases see *Fogg vs. Price*, 145 *Mass.*, 513; s. c., 14 *North East. Rep.*, 741; *Young vs. Martin*, 8 *Wall.*, 354; *Brown vs. Saratoga R. Co.*, 18 *N. Y.*, 495.]

§ 514. *Amended supersedes original*.—An amended pleading, when it appears to be the entire pleading, not a mere addition to the original, supersedes the original for the purpose of defining the issues.

Alexandria Canal Co. vs. Swann, 5 *How. U. S.*, 83, 88. (Amended declaration substituting a new count for the original one; and a new pleading interposed by defendant containing only part of the pleas he interposed to the original declaration.)

Hunter vs. Pfeiffer, 108 *Ind.*, 197; s. c., 6 *West. Rep.*, 403. (Holding that if subsequent to a decision on demurrer to the original, it will be deemed filed as an amendment by leave of court.)

Hanscom vs. Herrick, 21 *Minn.*, 9.

s. P., *Hubbard vs. Quisenberry*, 32 *Mo. App.*, 459.

Sherwood vs. Hauser, 94 *N. Y.*, 626. (The original complaint is superseded as to amount of *quantum meruit* therein alleged, by an amended complaint increasing the amount.) [s. P., *Embry vs. Palmer*, 107 *U. S.*, 3.]

Fry vs. Bennett, 3 *Bosw.*, 200, 233; *aff'd* in 28 *N. Y.*, 324.

Kanouse vs. Martin, 3 *Sandf.*, 593; s. c., 8 *N. Y. Leg. Obs.*, 305. (At common law.)

[*Compare Stevens vs. Parker*, 7 *Allen (Mass.)*, 361. (New declaration; new answer reasserting and adding to original answer; but no new replication.)]

Hulbert vs. Comstock, 11 *Gray (Mass.)*, 14. (Serving an amended answer without leave or sanction, *held*, not to supersede the original, nor to entitle defendant to give evidence under the amendment.) [In *N. Y.* the practice would usually entitle a plaintiff, in such case, to treat the amended answer as the answer in the cause, or require him to return it promptly as unauthorized.]

§ 515.—*unless both are answered as one.*—Where a defendant treats an original and an amended complaint as consolidated, and answers them as such, he cannot, on the trial, object that the amended complaint superseded the original.

Kline vs. Corey, 18 *Hun (N. Y.)*, 524.

§ 516. *Omission to designate.*—An amended pleading does not fail because not so designated upon its face.

Hurley vs. Second Building Association, 15 *Abb. Pr. (N. Y.)*, 206, note.

s. P., *Hunter vs. Pfeiffer*, 108 *Ind.*, 197; s. c., 6 *West. Rep.*, 403.

But a defendant who has wrongly entitled his pleading as an answer, instead of a counterclaim or cross-complaint, cannot take judgment for want of reply. *Goldman vs. Bashore*, 80 *Cal.*, 146; s. c., 22 *Pacif. Rep.*, 82. s. P., *Harrison vs. McCormick*, 69 *Cal.*, 616; s. c., 11 *Pacif. Rep.*, 456, 458.

§ 517. *Omission to amend responsive pleading.*—If after issue joined, the earlier of the two pleadings which

form the issue is amended, and the parties go to trial without any amendment of the answer or reply which was the responsive pleading, the original answer or reply stands as the answer or reply to the amended pleading; and a denial in such answer or reply is deemed to put in issue the amended pleading; except so far as the amendment has introduced substantially new matter, as distinguished from merely omitting or merely amplifying what was alleged in the original.¹

If substantially new matter has been introduced, of a nature to call for an answer or reply, it is not put in issue by the previous answer or reply which was addressed only to the original pleading.²

¹ *Dreilling vs. First Nat'l B'k*, 43 *Kans.*, 197; s. c., 23 *Pacif. Rep.*, 94.

² *Eslich vs. Mason City & Ft. Dodge Ry. Co.*, 75 *Iowa*, 443. (Action for damages for injury to property: general denial. Petition subsequently amended by an allegation that the town in which the railroad was built was incorporated. *Held*, that it was, if error, harmless to admit parol evidence that the town was incorporated, a fact necessary to plaintiff's recovery. The amendment added a material allegation. It was not answered by any subsequent pleading, and therefore was properly to be deemed true, and the fact of incorporation was not in issue. Citing *Rev. Code*, 2717.)

[*Contra* by statute in Arizona, *Civ. Pro. C.*, 8, § 95; *R. S.* 1887, ¶ 743.]

§ 518. *Delay to respond*.—If the time to answer or reply to an amended pleading has not expired, suffering the trial to commence on the issue previously raised does not waive the right so to answer or reply.

Low vs. Graydon, 14 *Abb. Pr. (N. Y.)*, 443. [s. p., *Ostrander vs. Conkey*, 20 *Hum (N. Y.)*, 421, holding that timely service of amended pleading supersedes adversary's notice of trial.]

§ 519. *Demurrer overruled*.—If a demurrer is overruled, and the demurrant serves an answer or reply to the pleading to which the demurrer was addressed, and

goes to trial, the demurrer is no longer available to his adversary as an admission of the facts alleged.¹

Where there are several causes of action in the same complaint, or several defences in the same answer, a demurrer to one, overruled and not withdrawn, is not an admission of allegations in the part demurred to which can avail the party on the trial of the issues of fact arising on another cause of action or defence than that demurred to.²

Where there are several successive pleadings,—as a reply to an answer,—and a demurrer to the last of the series is overruled, if the party does not withdraw the demurrer, but goes to trial on the issue raised by the earlier pleadings in the series, he is concluded on a trial of any issue raised in that particular series by the admission constituted by his demurrer.³

[But compare § , RECEPTION OF EVIDENCE.]

¹ *Dickey vs. Malechi*, 6 *Mo.*, 177; s. c., 34 *Am. Dec.*, 130. (Holding that going to trial on the issue of fact is an implied withdrawal of the demurrer.) [s. p., *Townsend vs. Jemison* 7 *How. (U. S.)*, 706.]

Marie vs. Garrison, 13 *Abb. N. C. (N. Y.)*, 215, 325 (Prof. DWIGHT as Referee).

Rice vs. Rice, 13 *Or.*, 337; s. c., 10 *Pacif. Rep.* 495. (LORD, J., says: "When allegations in a pleading are admitted for the purpose of a demurrer, they are admitted for that purpose only, and should not be commented upon by the Court as if they were *de facto* true." Citing *Day vs. Brownrigg*, 10 *Ch. Div.*, 294. "It is a pleading by which one of the parties, in effect, says that the facts stated by the adverse party in his pleading, even assuming them to be true, do not sustain the contention based on them, or, in a word, do not show a good cause of action or defence. This is not admitting the facts charged as *de facto* true. It is simply admitting the facts for the sole purpose of presenting their sufficiency to the Court for determination; or equivalent to saying: 'If the facts be so, the defendant is not bound to answer.'") s. p., *Tomkins vs. Ashby*, *Moody & M.*, 32 (Equity); *Pease vs. Phelps*, 10 *Conn.*, 62 (Common Law).

Wheelock *vs.* Lee, 5 *Abb. N. C.*, 72; s. c., less fully, 74 *N. Y.*, 495.

s. p., Teal *vs.* Walker, 111 *U. S.*, 242.

Fort Dearborn Lodge *vs.* Klein, 115 *Ill.*, 177, 2 *West. Rep.*, 33. (Under Illinois practice by which the Court may at any time set aside its order on demurrer, the trial judge may do so.)

* Dictum in Cutler *vs.* Wright, 22 *N. Y.*, 472.

To same effect, 1 *Chitt. Pl.*, 694; and see Montgomery *vs.* Richardson, 5 *C. & P.*, 247; Firmin *vs.* Crucifix, *id.*, 98; Stinson *vs.* Gardiner, 33 *Maine*, 94.

* Cutler *vs.* Wright, 22 *N. Y.*, 472. (Here, to a defence of the statute of limitations, plaintiff replied successive absences of defendant from the State; and defendant's demurrer to the reply was overruled, with liberty to withdraw it upon terms, but he went to trial without complying. *Held*, that the reply was admitted, and no evidence was required of the facts therein stated.)

[According to 1 *Dan. Ch. Pr.*, 592, a demurrer is not withdrawn by merely procuring an order for withdrawal, but must be actually taken from the file. Under our practice this may be ordered at any time.]

In McKinzie *vs.* Mathews, 59 *Mo.*, 99, NAPTON, J., says: "A demurrer admits facts well pleaded, but only for the purpose of deciding the question raised by it; the statements in the petition demurred to are no evidence on the question of damages, or on the general issue."

§ 520. *Demurrer sustained*.—If a demurrer to one of several causes of actions or defences is sustained, and the parties go to trial without amendment of the pleading, the part condemned on the demurrer is deemed as out of the record, and what it contains cannot be deemed, for the purpose of narrowing the issues, as an admission in favor of the demurrant.¹

But judgment entered on the demurrer is conclusive against the demurrant on any issue of fact in the other branch of the pleadings, so far as it involves the same question.²

¹ *Matthews vs. Beach*, 8 *N. Y.*, 173. (So held even of a demurrer which purported to be addressed to the whole

answer, but the grounds stated in which were applicable only to a single defence.)

¹ *Nispel vs. Laparle*, 74 *Ill.*, 306. (Assumpsit on three notes: Pleas of extension; also a plea of coverture of wife defendant. To the latter, plaintiff replied that the notes were given for a consideration binding her in virtue of her separate estate, setting forth the facts. Demurrer to replication overruled, and judgment entered in favor of plaintiff thereon. Thereafter, on trial of the other issues, *held*, that the facts as to the consideration of the notes were conclusively established by the judgment on demurrer, and need not be proved at the trial of the other issues. The Court—CRAIG, J.—say: “No proof was necessary upon this point, other than that appearing upon the record. The facts alleged on the replication . . . were admitted of record by the judgment on demurrer.”) S. P., next section.

§ 521. *Judgment on plea in abatement*.—A judgment on the trial of an issue of fact presented by a plea in abatement is, unless opened, conclusive on the subsequent trial of any other issue of fact in the cause; and may be relied on without further evidence.

Sharon vs. Hill, 26 *Fed. Rep.*, 337, 386. [As the Court may take notice of its own records, the judgment need not be formally read in evidence to the jury.]

§ 522. *Substitute for lost pleading*.—A pleading substituted by consent for a lost pleading stands as if it had been substituted by order of the court.¹

If it be subsequently amended in such manner as to present a different case from what it first did, and the original complaint be afterward restored, the amended copy will itself be retained as an amendment of the original, and be regarded as constituting a new count added to it.²

¹ *Chappell vs. Bates*, 56 *Conn.*, 568; s. c., 16 *Atl. Rep.*, 673. (Holding that under the rule of court allowing a sworn or certified copy to be substituted by order of Court, a copy might be substituted by consent.)

² *Id.*

§ 523. *Substituted party*.—Under the New Procedure a party brought in by substitution, as having succeeded to the rights of the original party, but not dependent for his case on any other new fact, may proceed under the original pleadings without a supplemental pleading, unless otherwise required by the Court.¹

And a defendant brought in by a supplemental complaint after answer, as having succeeded to the rights of the original defendant, does not by denying knowledge, etc., of a fact alleged in the original answer, put such fact in issue.²

¹ Garvey vs. Owens, 9 N. Y. State Rep., 227.

² Forbes vs. Waller, 25 N. Y., 430; s. c., as Forbes vs. Walter, 25 How. Pr., 166; aff'g Forbes vs. Logan, 4 Bosw., 475.

§ 524. *Stipulations, as to character of pleading*.—A stipulation or consent that a pleading stand for what it in substance is not—as that an answer shall stand for a cross-complaint,¹ or shall be regarded as a cross libel²—does not make it such. The Court will look to the real character and propriety of the pleading.

¹ Harrison vs. McCormick, 69 Cal., 616; s. c., 11 Pacif. Rep., 456. [Overruling previous decision in 9 Pacif. Rep., 114.]

² Ward vs. Chamberlain, 21 How. (U. S.), 572. (In admiralty.)

So at common law the parties cannot stipulate to try title to land, in assumpsit, etc. 1 Chitt. Pl., 16 Am. ed., 363. [Compare Bradford vs. Barclay, 42 Ala., 375, holding that a stipulation that defendant may be considered as pleading everything that will be a bar to plaintiff's right to recover, and that plaintiff replies in like manner, requires that the Court at the trial should consider as duly interposed every plea and replication that could be available to either of the parties, according to the nature of the case, as shown by the evidence.]

§ 525.—*for trial on the merits*.—A stipulation to try the case “on the merits,” does not exclude evidence under

defences pleaded which go to the existence of the cause of action,—such as the statute of frauds,—but it merely waives objections to matter of form, without relinquishing legal rights.

Banghart vs. Flummerfelt, 43 *N. J. L.*, 28.

“Chancery welcomes parties who submit their controversies irrespective of technical questions concerning the form of action or regularity of proceedings; and it was the clear duty of the trial judge, under the waiver and stipulation made at the outset of the trial, to give all the rights and issues presented full and final determination.” Per PRATT, J., in *Speir vs. Town of New Utrecht*, 49 *Hun* (*N. Y.*), 294; s. c., 2 *N. Y. Supp.*, 426; 17 *State Rep.*, 727; citing *Bank of Utica vs. City of Utica*, 4 *Paine* 399; Grand in *vs. Le Roy*, 2 *id.*, 509.

§ 526. *Stipulation modifying the issue*.—A stipulation that specified evidence may be put in, has the effect of enlarging the issue, as if the necessary allegation to render such evidence available had been added to the pleading.

Ackerman vs. Cobb Lime Co., 51 *Hun* (*N. Y.*), 310. (Stipulation that either party might read entries from the account of the other, *held* to entitle defendant to have the case treated as though set-off had been pleaded.)

s. P., *Whitehouse vs. Halstead*, 90 *Ill.* 95. (Holding that a party cannot object to the admission of evidence for want of proper pleadings when it is stipulated that the plaintiff may, on the trial, introduce any evidence which he could under pleadings properly pleaded and necessary to make out his case, and that the defendant may do likewise as to his defence under the general issue. This is a waiver of all technicalities, and consent to try the case on its merits.)

[As to the form and effect of such stipulations, see 2 *Abb. New Pr. & F.*, 649.]

§ 527. *Stipulation repugnant to the pleading*.—A stipulation which will entirely nullify the effect of the

pleading will be disregarded as repugnant, if it does not appear to have been intended to have that effect.¹

If partly repugnant to the pleading, it may be construed so as to give it effect in other respects only.²

¹ *Richards vs. Lake Shore, etc., R. Co.*, 124 *Ill.*, 516 ; s. c., 16 *North East. Rep.*, 909 ; s. c., 14 *West. Rep.*, 586. (Defendant in a bill in chancery to recover liquidated damages for breach of a contract, filed a demurrer to the bill, for want of equity, and with it a stipulation waiving all objection to the jurisdiction, on the ground of there being a remedy at law. *Held*, that the stipulation, being repugnant to the demurrer, was properly disregarded, it being evident that there was no intention to waive the demurrer, which was properly sustained.)

² *Dale vs. Roosevelt*, 9 *Cow. (N. Y. Ct. of Err.)*, 307, 315. (Holding that where a stipulation accompanying a plea which admits allegations of the other party, provides that any matters may be given in evidence with the same effect as if specially pleaded, it is not to be construed as modifying the admission, but only as allowing evidence of new matter in the nature of an affirmative defence.)

§ 528. *Power of counsel*.—The attorney of record has authority to consent to amendment of the pleadings at the trial ; and the counsel who have charge of the trial of the cause have authority to do so, even without the knowledge of the attorney of record.

Devlin vs. Mayor, etc., of N. Y., 15 *Abb. Pr. N. S. (N. Y.)*, 31.

1 *Abb. New Pr. & F.*, 450.

§ 529. *Executory stipulation for amendment*.—An oral stipulation for the amendment of a pleading does not avail without executing it by an actual change in the pleading,¹ or by entry in the minutes.²

But an equitable estoppel may be made out in support of an unexecuted oral stipulation.³

¹ *Jones vs. Davenport*, 45 *N. J. Eq. (18 Stew.)*, 77 ; 17 *Atl.*, 570.

² Common practice.

³ 1 *Abb. New Pr. & F.*, 452.

§ 530. *Amending to get rid of concession.*—The Court, and equally a referee,¹ has power to allow a party to amend at the trial by striking out an allegation or admission, from his pleading, for the purpose of modifying the issue.²

But this should not be done without evidence of mistake.³

¹ *Wilcox vs. Onondaga Co. Savings Bank*, 40 *Hun (N. Y.)*, 297. (Under *N. Y. Code Civ. Pro.*, § 1018.)

Price vs. Brown, 112 *N. Y.*, 677 ; s. c., 20 *North East.*, 381, 21 *N. Y. State Rep.*, 573. (Striking out a credit given by mistake.)

² *Northern Pacif. R. vs. Paine*, 119 *U. S.*, 561.

Conway vs. Mayor, etc., of N. Y., 8 *Daly*, 306. (Action for services of janitor of public building. Complaint alleging that plaintiff, "having claimed that he was irregularly employed," presented his demand to the supervisors, etc. Answer setting up counterclaim for what he had received, the counterclaim being founded on the admission. *Held*, that the Court had still power to allow amendment of the complaint by striking out the admission ; and might thereupon order the trial to proceed on the pleading as amended, as defendant did not claim to be surprised or unprepared to proceed, nor ask for time to answer the amended pleading.)

Breunich vs. Weselman, 100 *N. Y.*, 609 ; s. c., 22 *Weekly Dig.*, 355. (Holding that an answer which sets up inconsistent defences may be amended even after the trial, by allowing one of them to be stricken out.)

³ *Miller vs. Moore*, 1 *E. D. Smith*, 739 ; s. c., 12 *N. Y. Leg. Obs.*, 53. (Holding that a sworn pleading should not be allowed to be amended on the trial by striking out an admission, without satisfactory evidence that it was put in under a mistake of facts, or that the party had been deceived or misled. The Court say : "The language of a pleading is always to be taken most strongly against the pleader ; and if this averment did admit of the equivocal claim for it by counsel on the argument, the plaintiffs have a right to use it as an admission, if it can bear that interpretation.")

[But striking out the allegation or admission for the purpose of modifying the issue does not prevent the adversary from reading in evidence the allegation or admission as a declaration of the party previously made. *Civil Jury Brief*, § ; *Smith vs. Nimocks*, 94 *N. C.*, 243, and *cas. cit.* And this is a sufficient reason for not refusing leave to amend merely because of the value of the admission as evidence. The only questions are the good faith of the party asking leave, and the surprise to the other party.]

[For the rule that such amendments cannot be allowed to introduce a new cause of action, nor make an entire change of parties on either side, but may change a defence, see *RECEPTION OF EVIDENCE*.]

§ 531. *Denial lets in different version.*—A denial lets in evidence of defendant's version of the alleged transaction, if it be in any material particular different from that of plaintiff.

Marsh vs. Dodge, 66 *N. Y.*, 533, *rev'g* 4 *Hun*, 278; *s. c.*, 6 *Supm. Ct. (F. & C.)*, 568. (Contract pleaded without contemporaneous qualifying contract.)

s. p. Abb. Brief on Facts, 104, 127.

Koehler vs. Adler, 91 *N. Y.*, 657. (Allegations of personal loan. General denial lets in evidence that the transaction was with defendant as officer and agent of a corporation which was the borrower.)

Judge vs. Judge, 14 *Civ. Pro. R.*, 138. (Slander. Error under general denial to limit the testimony of defendant's witnesses to a denial of words stated by plaintiff's witnesses. Judgment reversed therefor.)

Mississippi Rev. Code (1880), § 1550. "If the defendant shall desire to prove under the general issue in any action any affirmative matter in avoidance which by law may be proved under such plea, he shall give notice thereof in writing annexed to or filed with the plea, otherwise such matter shall not be allowed to be proved at the trial; and the defendant may in all cases plead the general issue and give written notice therewith of any special matter which he intends to give in evidence in bar of the action, and which he would be otherwise obliged to plead specially; and when notice shall be given by the defendant, as aforesaid, the plaintiff shall, before the trial of the cause, file a written notice to the defendant of any special matter which he intends to

give in evidence, in denial or avoidance of such special matter so given notice of by the defendant, and which it would have been necessary to reply specially, had the defendant's defence been specially pleaded; and if notice be not given as required by this section, no proof of such matters shall be received on the trial."

Rawson vs. Finlay, 27 *Mich.*, 268. (Trespass for a tortious entering of certain premises and taking and carrying away certain lumber of plaintiff. *Held*,—the case, involving title to premises, having been sent from justice's to circuit court,—that it was error to exclude evidence going to show defendant's having had exclusive and adverse possession of the premises and that he was the owner. The plea of not guilty, never more comprehensive than our statutory general issue, is construed as a denial of all the material allegations in the declaration, and as sufficient to enable the defendant to contest all such allegations in evidence, and to put the plaintiff upon the proof of all or any of them, and under it a freehold or mere possessive right in the defendant may be given in evidence. Citing *Kinnie vs. Owen*, 1 *Mich.*, 249; *Young vs. Stephens*, 9 *Mich.*, 500; *Edwards vs. Chandler*, 14 *Mich.*, 471. Therefore reversed.)

University of Des Moines vs. Livingston, 57 *Iowa*, 307, 312. (Action for subscription: verdict for defendant. *Held*, that evidence of raising money and of making improvements which, if done in consequence of and relying upon the subscription in question, would constitute a consideration to support the subscription, was improperly excluded. The plaintiff does not seek to avoid the allegation of the answer that the plaintiff had sustained no detriment on account of the subscription, but to disprove it. No reply was required or proper, to make an issue, to admit the evidence. The allegations of the answer were deemed denied. Citing *Cassidy vs. Caton*, 47 *Iowa*, 22. Reversed.)

Iowa Rev. Code (Miller), 1888, § 2704. "Under a denial of an allegation no evidence shall be introduced which does not tend to negative some fact the party making the controverted allegations is bound to prove."

Massachusetts Rev. Stats., 1882, c. 167, § 15. "Special pleas in bar as formerly used, and the general issue in all except real and mixed actions, are abolished, and in place thereof the defendants shall file an answer to the declaration. In real and mixed actions, the defendants may give in evidence under the general issue all matter which might formerly have been pleaded in bar."

Indiana Civ. Pro. Rev. Stats., 1888, § 356 (102). "All

defences, except the mere denial of the facts alleged by the plaintiff, shall be pleaded specially. (66.)”
Indiana Civ. Pro. Rev. Stats., 1888, § 377. (127.) “Under a mere denial of any allegation, no evidence shall be introduced which does not tend to negative what the party making the allegation is bound to prove. (91.)”

§ 532. *Striking out.*—Plaintiff has not a right to have a sham or irrelevant defence struck out on motion at the trial.

Smith vs. Countryman, 30 *N. Y.*, 655, 668. (Affirming judgment where such motion was denied; with dictum that the remedy was by demurrer or motion on notice before trial.) [But he may move for judgment on the pleadings.]

4. WHAT KIND OF ALLEGATIONS TENDER AN ISSUE.

[I have not repeated here the more numerous rules which will be found under DEMURRER and under RECEPTION OF EVIDENCE.]

[See also §§ 561–570, *Admissions by not denying.*]

§ 533. Conclusion of law.

534. What is a fact, and what a conclusion.

535. Treating insufficient allegations as issuable.

536. Material allegations.

537. By virtue whereof, “virtute cujus.”

538. Hypothetical allegation.

539. Allegation of contents of document.

540. Allegation of amount or value.

541. Express admission.

542. Approximate amount, etc.

§ 543. Several grounds for one recovery.

544. Ground of recovery or defence implied but not alleged.

545. Motive of pleader cannot countervail pleading.

546. Formal allegations required by rule of court.

547. Presumption inconsistent with allegations.

548. Inconsistent protestation does not prejudice.

549. Denial of anticipated defence does not change burden of proof.

§ 533. *Conclusion of law.*—A denial of allegations which are only legal conclusions, does not raise an issue.

Adams vs. Adams, 21 *Wall. (U.S.)*, 185. (Allegation of facts amounting to delivery, and denial only of delivery.)

Tyner vs. Hays, 37 *Ark.*, 599. (Under the Arkansas statute requiring specific denials, the denials must be of allegations of fact, not of propositions of law. "Things to be pleaded, not matters to be argued." *Non detinet*, therefore bad.)

Wells vs. McPike, 21 *Cal.*, 215. (Denial of indebtedness.)

Levinson vs. Schwartz, 22 *Cal.*, 229. (An admission of indebtedness, though resulting only from a bad denial, raises a presumption of promise to pay; and a denial of any promise to pay raises no issue.)

People vs. Lowden (Cal., 1885), 8 *Pacif. Rep.*, 66. (Denial of illegality.)

Curnow vs. Happy Valley, etc., Mining Co., 68 *Cal.*, 262; s. c., 9 *Pacif. Rep.*, 149. (Mechanic's lien. Denial that plaintiff has at all complied with the requirements of the provisions of a specified statute relating to such liens, or that he is "entitled to any lien.")

Gale vs. James, 11 *Colo.*, 540; s. c., 19 *Pacif. Rep.*, 446. (Denial that defendant owes the sum alleged or any sum whatever, on an account or otherwise.)

Van Buren vs. Swan, 4 *Allen (Mass.)*, 380. (Denial of indebtedness.)

Hawes vs. Ryder, 100 *Mass.*, 216. (Denial that plaintiff is the holder of any such note, as he has declared upon, and that he owes the plaintiff the amount thereof or any part thereof. *Held*, that under this answer, evidence that the plaintiff was not and never was the owner or holder of the note was properly excluded. A mere denial of a general conclusion of law or fact, or of the leading averment in the declaration, is not sufficient to prevent the defendant's being held to have admitted other specific allegations.)

Frasier vs. Williams, 15 *Minn.*, 288.

Emery vs. Baltz, 94 *N. Y.*, 408. (Denial of indebtedness.)

Fleury vs. Roget, 5 *Sandf. (N. Y.)*, 646. (Denial that plaintiff was the lawful owner and holder of the note sued on.)

Excelsior Savings Bank vs. Campbell, 4 *N. Y. Supm. (T. & C.)*, 549; s. c., 48 *How. Pr.*, 347; *aff'd*, it seems, in 62 *N. Y.*, 137. (Foreclosure: answer denying that defendants were in default in the payment of interest.)

Simpson vs. Prather, 5 *Oreg.*, 86. (Denial of indebtedness to a specified sum.)

[*Contra*, *Simmons vs. Sisson*, 26 *N. Y.*, 264 (which must be deemed overruled on this point); *California State Tel. Co. vs. Patterson*, 1 *Nev.*, 150.]

§ 534. *What is a fact, and what a conclusion.*—The same statement may be a fact or a conclusion, according to the context.

See note on page 121.

Levins *vs.* Rovegno, 71 *Cal.*, 273 ; Turner *vs.* White, 73 *Cal.*, 299. (Title, seisin, or ownership.)

§ 535. *Treating insufficient allegations as issuable.*—A party who has treated an indefinite or uncertain allegation,¹ or one which might be deemed a conclusion of law,² as sufficient by taking issue on it and going to trial, may be held to have waived the objection.

¹ Seeley *vs.* Engel, 13 *N. Y.*, 542, 548 ; Currie *vs.* Cowles, 6 *Bosw. (N. Y.)*, 452, 460. (Indefiniteness and uncertainty waived by taking issue as if the pleading were understood.)

² Atkins *vs.* Gladwish, 27 *Nebr.*, 841 ; s. c. 44 *North West Rep.*, 37. (General allegation of assault. COBB, J., says: "In many cases the dividing line between the statement of a fact and a conclusion is so obscure as to be difficult to define; and in such cases, in this practical age, and under our liberal system of pleading, a court will generally adopt the construction which the parties themselves, by their acts, appear to have placed upon such language in a pleading.")

s. p., Morrow *vs.* Cougan, 3 *Abb. Pr. (N. Y.)*, 328. (Holding that where plaintiff merely avers that defendant is indebted to plaintiff, instead of setting forth the contract on which the indebtedness arises, he should not complain if defendant takes issue upon such indebtedness.)

s. p., Weinbauer *vs.* Morrison, 49 *Hun (N. Y.)*, 498, 500. (Complaint alleging indebtedness, and answer denying it, *held* an issue; for the answer was as broad as the cause of action alleged.)

Clough *vs.* Clough, 26 *N. H.*, 24.

[Compare Tyner *vs.* Hays, 37 *Ark.*, 599. (Case of bad denial). The Court, recognizing the waiver, hold that the reception of evidence should be restricted to the simple and obvious meaning.)]

§ 536. *Material allegations.*—At Common Law an al-

legation is not issuable unless it is essential to make out a cause of action. In Equity an allegation is issuable if plaintiff has a right to prove it in order to have all the relief sought to its full extent. In many of the States the statutes declaring that material allegations are admitted by failure to deny, define "material" in the common-law sense.¹ It is the better opinion that under the New Procedure, where there is no such statutory definition, the equity practice should apply.²

¹ In the following States the statutes define a material allegation in a pleading as "one essential to the claim of defence, and which could not be stricken from the pleading without leaving it insufficient:" *Arkansas*, Mansf. Dig. Stats., 1884, § 5073; *California*, Civ. Pro., Deering's Anno. Code, 1885, § 463; *Colorado*, Civ. Pro., § 72; *Idaho*, Rev. Stats., 1887, § 4218; *Kansas*, Civ. Pro., § 129, Gen. Stats., 1889, § 4212; *Kentucky*, Codes (Carroll), 1888, § 127 (154); *Montana*, Comp. Stats., 1887, § 110; and *Nebraska*, Comp. Stats. (1887), Code Civ. Pro., § 135.

² This does not include, of course, general statements of the amount of unliquidated damages, as distinguished from specific statements of value, cost, expenditure, and the like, as a basis for such damages. It is a part of the object of the New Procedure to narrow the issues and diminish the labor of the Court, and to require plaintiff to specify the substantive facts of all kinds which he relies on, whether essential to a cause of action or not, if they are only relevant to constitute his cause of action in all its entirety of relief, and to lay out of the issue whatever of these defendant does not deny.

For authorities see the §§ below, and *Reception of Evidence*. [*Contra*, *Wood vs. Steamboat Fleetwood*, 19 Mo., 529, 531. (Holding value or amount not admitted; because "material," in the rule as to failure to deny means essential, so that the importance of the allegation shall be brought to the mind of the defendant.)]

§ 537. *By virtue whereof*: "*virtute cujus*."—If the pleader, after alleging matters of fact, adds "by virtue whereof," then stating a conclusion, the conclusion is not issuable if it is mere matter of law.¹ It is issuable if it

contains matter of fact, though mixed with matter of law.²

¹ *Dresser vs. Brooks*, 3 *Barb. (N. Y.)*, 429, 437. (After alleging facts as to a discharge, adding "by virtue of the aforesaid discharge the defendant was fully discharged from said," etc., a mere conclusion of law, and not traversable.)

s. p., *Turner vs. White*, 73 *Cal.*, 299.

² *Stickle vs. Richmond*, 1 *Hill (N. Y.)*, 77. (After stating a warrant, alleging that an arrest was made by virtue thereof, *held*, a mixed matter of law and fact, and therefore traversable.)

s. p., 1 *Chitt. Pl.*, 16 *Am. ed.*, 642.

§ 538. *Hypothetical allegation*.—A good allegation in avoidance, or by way of counterclaim or offset, is not vitiated by being introduced hypothetically in such manner as not to admit the truth of the matter sought to be met.

Bell vs. Brown, 22 *Cal.*, 671. (Denial of plaintiff's title : allegation that if plaintiffs ever had a title, they had abandoned and forfeited it before defendant's entry. *Held*, error to compel defendants to elect. They had the right to set up both defences in their answer, and support the same by proof.)

Vinal vs. Richardson, 13 *Allen (Mass.)*, 521, 525. (Denial of signing alleged agreement, adding "and that if he ever did sign such a paper, it was without consideration," *held*, a good denial of signing, and of consideration.)

Swett vs. Southworth, 125 *Mass.*, 417. (Answer "that if the plaintiff shall prove the making of the note declared on, or any of the items in the plaintiff's bill of particulars, the same have been fully paid," *held*, a positive allegation of payment. Distinguishing *Caverly vs. McOwen*, 123 *Mass.*, 574.)

Chatfield vs. Simonson, 92 *N. Y.*, 209. (Plaintiff sued on a contract for services. Defendant pleaded plaintiff's misconduct in bar; also that if plaintiff established a right to recover, defendant would rely on the same matter as a counterclaim or recoupment. *Held*, proper. The Court may administer the relief to which the facts

set forth in a pleading seem to entitle the party, without regard to the particular form of relief demanded. The pleading by way of set-off did not amount to a ratification.)

Everitt vs. Conklin, 90 *N. Y.*, 645. (Allegation in plaintiff's complaint, intended to meet and avoid defendant's anticipated version.)

Citizens' Bank vs. Closson, 29 *Ohio St.*, 78. (Answer denied the making of the note sued on; and as a second defence, alleged that if the signature to the note was genuine, it was obtained by fraud, and that there was no valid consideration for the note. *Held*, proper; and error to compel election.)

[For other cases see § , *Denials*.]

§ 539. *Allegation of contents of document*.—An allegation that a document contained specified statements, is not equivalent to an allegation of their truth.

Morris vs. Parker, 3 *Johns Ch.*, 297. (Holding that a denial of the instrument was enough, without denying the truth of its contents.)

For some exceptions to this rule, where the instrument proceeds from the party denying, or binds him, see § 228.

Conversely, a denial of knowledge or information sufficient to form a belief "as to" a document, is not a denial of an allegation in the complaint of the truth of statements in the document. *People vs. Fields*, 58 *N. Y.*, 491.

§ 540. *Allegation of amount or value*.—Under the New Procedure, unless the statute provides otherwise, the following rules should be applied:¹

1. An allegation of amount or value, affecting only the amount of recovery, as distinguished from a case where the specific amount is essential to make out a cause of action, is not traversable alone, unless it is controverted by an avowedly partial defence, as it may be in some jurisdictions;² and a denial of such an allegation, if there is no further answer, only raises a question on the assessment of damages.

But a general denial which puts in issue the whole

cause of action entitles the defendant to give evidence controverting the amount or value, as at Common law and in Equity.

2. An allegation of amount or value which is essential to make out a cause of action or jurisdiction,³ is traversable, and a denial even with nothing more raises an issue.

3. An allegation of any specific fact, as distinguished from a matter of opinion and other than a statement of unliquidated damages, is (in the absence of statute to the contrary) admitted by failure to deny it, notwithstanding the fact be a matter of amount, value, time or place, provided it only be simply matter of fact, and material in the sense of being the proper subject of proof under the complaint to enable the plaintiff to recover all the relief he seeks.⁴

¹ These rules are not to be followed as guides in framing a pleading, without careful consideration of the condition of the question on the decisions in the practitioner's own State, such is the conflict of opinion and the persistence of the old common-law rule.

² See § 467, DEMURRER TO ANSWER.

³ These exceptions are well recognized in *Stuart vs. Binsse*, 10 *Bosw. (N. Y.)*, 436, 446.

⁴ As to the above rules, compare the following authorities, and the following statutes contrary to the text; and compare those under § 467, etc., DEMURRER TO ANSWER, and see also RECEPTION OF EVIDENCE.

Thew vs. Miller, 73 *Iowa*, 742; s. c., 36 *North West.*, 771. (In conversion, a general denial puts in issue the value of the property at the time of the conversion.)

Butcher vs. Bank of Brownsville, 2 *Kan.*, 70, 82. (Action on a judgment. *Held*, not error to enter judgment without a jury. This was a suit for a sum certain—a debt *eo nomine*, and not sounding in damage. These being necessary allegations, are to be taken as true, unless there are "allegations of value or of amount of damage." There being none such in this case, the petition was to be taken as true, and there was nothing for a jury to try or to do.)

Douglas vs. Rinehart, 5 *Kans.*, 392. (Under *Kans. Stat. Civ. Code*, § 128.)

Skillman vs. Muir, 4 *Metc. (Ky.)* 282. (Action upon a covenant for hire and to furnish a slave with winter and summer clothing and a blanket. *Held*, error to render judgment by default for the \$15 which the blanket and clothing were alleged to be worth, without proof of their value. The Code declares that allegations of value or of amount of damage shall not be taken as true by the failure to controvert them. (Sec. 153.) Distinguishing Harris vs. Ray, 15 *B. Mon.*, 628 (suit on physician's account for medical service and medicine), and Francis vs. Francis, 18 *B. Mon.*, 60 (suit on merchant's account for goods sold and delivered, where the Court sustained judgment by default without proof, not in that they alleged the sums to be due and owing, but that upon the facts stated in each case there was an implied *assumpsit* to pay the amount claimed by the plaintiff). Citing Snodgrass vs. Broadwell, 2 *Litt. (Ky.)*, 353; Jenkins vs. Richardson, 6 *J. J. Mar. (Ky.)*, 441. Under the Code, what the law implies need not be averred. (Secs. 115, 144.) Citing as reversing judgments by default, without proof, Daniel vs. Judy, 14 *B. Mon.*, 393, for value of coal taken by defendant; Clarke vs. Seaton, 18 *B. Mon.*, 226, for value of goods—common carrier failed to deliver as agreed; Huston vs. Peters & Co., 1 *Metc., Ky.*, 558, for value of cash notes, not assigned as covenanted to be assigned; and Marr's Admr. vs. Prather, 3 *Metc. (Ky.)*, 196, for breach of covenant as in this case. The law does not imply a promise to pay damages which the defendant has covenanted to pay. The value of the blanket and clothing in this case should have been proven. Reversed.)

German-American Bank vs. White, 38 *Minn.*, 471; s. c., 38 *North West.*, 361. (In ejectment a general denial puts in issue the allegation of value of rents and profits.)

Steele vs. Thayer, 36 *Minn.*, 174; s. c., 30 *North West. Rep.*, 758. (Use and occupation. The complaint alleged that the worth of the use and occupation was a certain sum; the answer admitted the worth of the use of the entire premises to be as alleged.—*Held*, error to exclude evidence that defendant used and occupied a part only. The admission will not render defendant liable for more than he used and occupied.)

Pullen vs. Wright, 34 *Minn.*, 314; s. c., 26 *North West. Rep.*, 394. (A counterclaim, by the buyer, on breach of warranty where the pleader alleges only the diminution in value by reason of the breach, instead of alleg-

ing the sound value, and the actual value with the defect, he must prove the sound and the actual value as a basis for damages. The separate allegation of the amount of diminution in value is not admitted by not denying. [Citing *Benton vs. Schulte*, 31 *Minn.*, 312, 314; s. c., 17 *North West. Rep.*, 621.]]

Kansas City Hotel Co. vs. Sauer, 65 *Mo.*, 279. (Action on indemnifying bond. Count on a breach alleged that plaintiff had been compelled to pay and had paid \$500 for attorney's fees, costs and expenses in defending the subject of the bond. *Held*, there was no error in the finding of the court in the sum of \$500 on that count in favor of the plaintiff, for the allegation, being undenied as to the amount paid out for attorney's fees, etc., was properly taken as admitted. There are many cases where allegations of value, amount of damage, etc., are immaterial and need no denial. But the allegation here is that of a specific and material fact, which becomes none the less specific and material because no denial thereof be interposed. Very often, as well under the Code as at the common law, the pleadings may be so shaped as to render that material which otherwise would not be so. This was done in this instance. This point is illustrated in *Marshall vs. Thames Fire Ins. Co.*, 43 *Mo.*, 586. There, in order to a recovery, it need not to have been alleged that the steamer *Magnolia* was worth "more than all the insurance thereon," but this allegation not being denied was held admitted.

Nebraska Comp. Stats. 1887, *Code Civ. Pro.*, § 134. "Every material allegation of the petition not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, shall, for the purpose of the action, be taken as true; but the allegation of new matter in the reply shall be deemed controverted by the adverse party as upon a direct denial or avoidance. Allegations of value, or of amount of damage, shall not be considered as true by failure to controvert them."

White vs. Smith, 46 *N. Y.*, 418; rev'g 1 *Lans.*, 469. (Allegation that a specified indebtedness on account was incurred, and that a specified balance "remains due after deducting payments," without specifying the payments, admits payments to the amount there indicated; and defendant may insist on the admission without himself admitting the balance, or the items of plaintiff's account.)

Darling vs. Brewster, 5 *N. Y. Supm. Ct. (T. & C.)*, 670; mere mem. of s. c., 3 *Hum.*, 218. (Action for an account-

ing and contribution, complaint alleging a specified sum due. Defendant's demurrer was overruled, and he failed to answer. *Held*, that he thereby admitted that the specified sum was due to the plaintiff; and the allowance of that item by the referee, as proved, was proper. *Aff'd* in 62 *N. Y.*, 630, without opinion.)

s. P., Gregory *vs.* Wright, 11 *Abb. Pr.*, 417. (Action for price of goods sold; holding that a denial of the value alleged was a good issue. Followed in *N. Y. City Ct.*, Parker *vs.* Tillinghast, 1 *N. Y. State Rep.*, 296.)

Williams *vs.* Hayes, 20 *N. Y.*, 58. (Plaintiff claimed to be interested as a partner in a contract of the firm, which they were prevented from performing completely, and in a modified contract in extension of the first, which second contract they performed, and under it were entitled to a specified sum, and they owed also a certain sum. These allegations of assets and debts were not denied. *Held*, that the resulting admission fell when the Court found on the evidence that plaintiff was interested in only the first contract. The Court say: "The true view of that allegation (of amount of assets and debt) is to regard it as dependent upon the plaintiff's own averment of the extent of his interest, and that the overthrow of plaintiff's position on that subject carried with it whatever of admission would have been implied from the unanswered allegation.")

New York Dry Dock Co. *vs.* McIntosh, 5 *Hill (N. Y.)*, 290. (Plea of payment in an action of assumpsit does not admit the whole amount of damages laid in the declaration; and although the defendant proves the payment of a smaller amount than that claimed by the plaintiff, if the plaintiff gives no evidence to establish the amount of damages in excess of the payment, the defendant will be entitled to a verdict. New trial denied.)

Connoss *vs.* Meir, 2 *E. D. Smith (N. Y.)*, 314. (Action for conversion of a watch worth \$20. Denial of conversion, but none of value. *Held*, that although the answer does not deny the averment of value, plaintiff must, notwithstanding, prove the amount of his damages.)

McKensie *vs.* Farrell, 4 *Bosw. (N. Y.)*, 192. (Counterclaim for conversion. *Held*, that value or damage must be proved on an assessment of damages, although alleged and there was no reply. Without such allegation defendant is entitled to nominal damages.)

Followed in DeGraaf *vs.* Wyckoff, 13 *Daly*, 366, 371. (Action for converting coupons. *Held*, that an allegation that their nominal and actual values respectively were a specified sum each, was not admitted by failure to deny.)

Wandell vs. Edwards, 25 *Hun* (N. Y.), 498. (Holding that even in actions of tort the question of actual damages is raised by a general denial, for what injury a plaintiff has received is a part of his proof to be met by counterproof without any special pleading.) [Followed in *Young vs. Johnson*, 46 *Hun* (N. Y.), 164, 168; s. c., 11 *N. Y. State Rep.*, 590, 593.]

Compare Blanchard vs. Tulip, 32 *Hun* (N. Y.), 638; s. c., 19 *Weekly Dig.*, 145.

[This question was noticed but not determined in *Isham vs. Davidson*, 52 *N. Y.*, 237, 241.]

McKinnon vs. McIntosh, 98 *N. C.*, 89. (Action for price of goods sold; denial that value was more than a specified sum. *Held*, that this raised an issue for the jury.)

In several of the States the statute declares that allegations of value or of amount of damage shall not be deemed true by a failure to controvert them.

Arkansas Mansf. Dig. Stat. 1884, § 5072.

Iowa—Rev. Code (*Miller*), 1888, § 2712. (*Yoe & Co. vs. Nichols*, 51 *Iowa*, 330; *McIntosh vs. Lee*, 57 *id.*, 356.)

Indiana—Civ. Pro. Rev. Stats., 1888, § 393 (110). "Allegations of value or amount of damage shall not be considered as true by the failure to controvert them; but in actions upon account, in which an itemized bill of particulars, the correctness of which is duly affirmed or sworn to by the plaintiff, or some one in his behalf, has been filed with the complaint, a default by the defendant shall be deemed to admit the correctness of the bill of particulars as sworn or affirmed to, and judgment may be rendered thereon without further evidence (74)."

Kansas—Civ. Pro., § 128; *Gen. Stats.*, 1889, § 4211. Allegations of value or of amount of damages shall not be considered as true by failure to controvert them; but this shall not apply to the amount claimed in actions on contract, express or implied, for the recovery of money only.

Kentucky—Codes (*Carroll*), 1888, § 126 (153). Among allegations which must be proved, though not traversed, are: "4. Allegations concerning value or amount of damage not accompanied by an allegation of an express promise, or by a statement of facts showing an implied promise to pay such value or damage; such allegations, so accompanied, need not be proved unless traversed."

Nebraska, above, p. 443.

§ 541. *Express admission*.—An express admission or concession in a pleading is not equivalent to an allegation of the fact conceded, in such sense that the pleader can claim the fact to be admitted by his adversary's failure to deny it.

Brown vs. Wakefield, 1 *Gray* (Mass.), 450. [The decision was put, in part at least, on the Mass. rule that only substantive facts are admitted by failure to deny. But it seems a sound general principle; and clearly must be recognized in respect to verified responsive pleadings, for a specific admission in pleading is not an allegation upon which perjury can be assigned. *People vs. Christopher*, 4 *Hun* (N. Y.), 805, so holding even though the admission be made by rehearsing the admitted allegation embodied in an affirmative form.]

§ 542. *Approximate amount, etc.*—An allegation that an amount was "about a specified sum," is not admitted by failure to deny it.

Woodruff vs. Cook, 25 *Barb.* (N. Y.), 505. (Omission to deny allegation that property was worth "about \$130," still leaves defendant at liberty to show true value.)

Thompson vs. Lumley, 7 *Daly* (N. Y.), 74. (Allegation that plaintiff was compelled to pay "about \$700:" *dictum* that such an allegation, though not denied, leaves the burden on the party making it to prove the true amount.)

§ 543. *Several grounds for one recovery*.—Where plaintiff's complaint states, as if a single cause of action, several grounds for one recovery,—such as a contract indebtedness with fraud in contracting it,¹ or an original note with a renewal note therefore,² or an indebtedness with a judgment recovered thereon,³—the question which the plaintiff must prove in order to recover, is a question of interpretation, to be determined in view of the requirement that a complaint must fairly indicate to the defendant the claim that he must be prepared to try.

In determining this question the following considerations are often decisive in practice.

If one cause of action is formally stated, and that which is peculiar to the other is but incidentally or informally added, the incidental allegations may be disregarded as surplusage.⁴

If one is sufficiently and the other insufficiently pleaded, the sufficient one may be regarded as the one which plaintiff must establish in order to prevail.⁵

If one may be regarded as matter stated by way of avoidance of an anticipated defence, which defendant might have interposed to the other, the latter and not the former will be regarded as the cause of action.⁶

If either may be regarded simply as evidence,—as in the case of several promises, implied or express, to do substantially the same thing, or several acts or neglects as causes of the same injury,—proof of any one may be treated as competent and sufficient.⁷

If one merged and extinguished the other as matter of law, the earlier liability may be regarded as properly alleged as matter of inducement, and competent to be proved, and the plaintiff may be held to prove the later and paramount obligation in order to prevail.⁸

If it is doubtful whether the cause of action intended is on contract or in tort, every intendment is in favor of sustaining defendant's claim that plaintiff cannot prevail without proof of the tort.⁹

The fact that plaintiff has omitted to allege damages as caused by a tort, and that the demand of judgment is appropriate to an action for a money demand on contract, rather than damages as for a tort, indicates that the action is on contract.¹⁰

Whether plaintiff should be allowed to amend so as to recover when otherwise he could not, depends on whether defendant shows he has been surprised.

¹ For illustration compare *Peck vs. Root*, 5 *Hun* (N. Y.), 547, (followed in *Combs vs. Dunn*, 56 *How. Pr.*, 169), with *Graves vs. Wait*, 59 *N. Y.*, 156.

² *Winsted Bank vs. Webb*, 39 *N. Y.*, 325, aff'g 46 *Barb.*, 177. (Recovery on either indifferently allowable.)
[*Contra*, *Williams vs. McAllister*, 23 *N. Y. Weekly Dig.*, 97. (But here it did not appear that the renewal notes were due before suit brought.)]

Krower vs. Reynolds, 99 *N. Y.*, 245; s. c., 21 *Weekly Dig.*, 466; rev'g 9 *Id.*, 383. (Holding it not improper to allege in a complaint the consideration or original indebtedness by way of inducement, preliminary to the allegation of a judgment thereon forming the cause of action, even though such original consideration was merged in the judgment. Dictum by way of reaching the conclusion that the action was not intended to be on the original consideration, because it was not sufficiently alleged to stand alone as the cause of action.)

s. r., *Tell vs. Yost*, 56 *Super Ct. (J. & S.)*, 456; s. c., 22 *State Rep.*, 415; 5 *N. Y., Supp.*, 5.

Walters vs. Continental Ins. Co., 5 *Hun.*, 343. (Denying motion to compel separate statement of contract and of award thereon as separate causes of action.)

Compare Greenfeld vs. Mass. Mut. Life Ins. Co., 47 *N. Y.* 430, where an incidental allegation of account stated was held not conclusive.

Thompson vs. Minford, 11 *How. Pr.*, 273. (Refusing to set aside amended complaint which added to a cause of action on a note, an allegation that plaintiff had recovered judgment on it in another State. MITCHELL J., said: "Other instances have occurred before this Court, in which they have found it necessary to allow this narrative mode of stating all the facts (not the evidence of facts) in a complaint; as where the original cause of action was set forth, and also a judgment obtained on it in another State; and there was reason to apprehend that the defendant meant, if the statement of the judgment were struck out, to set it up in bar, and if it were left in, and the consideration on which it was founded were struck out, then to plead that the Court in which the judgment was obtained had not obtained any jurisdiction over the person of the defendant; in such cases the Court has refused to strike out either allegation.")

⁴ See *Conaughty vs. Nichols*, 42 *N. Y.*, 83, 87; *Bedell vs. Carll*, 33 *id.*, 581.

⁵ *Krower vs. Reynolds* (*above cited*).

⁶ *Wiegand vs. Sichel*, 4 *Abb. Ct. App. Dec.*, 592; aff'g 34 *Barb.*, 84; and see note in 23 *Abb. N. C.*, 93.

⁷ See for instance *Dunning vs. Thomas*, 11 *How. Pr.*, 281.

Holding, in an action for breach of promise of marriage, that successive promises were not several causes of action, but evidence under one.)

s. p., *Walsh vs. Kattenburgh*, 8 *Minn.*, 127. (Several promises to pay.)

Wagner vs. Nagel, 33 *Minn.*, 348; s. c., 23 *North West. Rep.*, 308. (Allegation of agreed price, and of reasonable value. Motion to compel election denied.)

Same effect, *Barrett vs. Aller Veneer Seat Co.*, *N. Y. Daily Reg.*, May 6, 1884.

[*Contra*, *Gardner vs. Locke*, 2 *N. Y. Civ. P.*, 252.]

* See *Krower vs. Reynolds* (*above cited*).

* *Goodwin vs. Griffis*, 88 *N. Y.*, 629, 639, and *McDonough vs. Dillingham*, 43 *Hun*, 493, 496.

¹⁰ *Hoboken Beef Co. vs. Loeffel*, 23 *Abb. N. C.*, 93, with note. *McDonough vs. Dillingham*, 43 *Hun*, 493, 497.

§ 544. *Ground of recovery or defence implied but not alleged.*—A fact not alleged is not available as of the substance of the issue merely because another fact which necessarily implies its existence is alleged. It cannot be so deemed if the facts alleged do not suffice to give the adverse party fair notice that those implied would be relied on by the pleader.

Thus an answer by the defendant in a creditor's suit alleging a discharge in bankruptcy, does not let in evidence that an assignee had been appointed, so as to divest the creditor of his right to sue, and vest it in the assignee. *Dewey vs. Moyer*, 72 *N. Y.*, 70, 77; aff'd 9 *Hun*, 473, and aff'd in turn in 103 *U. S.*, 301, 304, approving this point.

EARL, J., in the *N. Y.* Court said: "It may be that the necessary inference from the answer as to the discharge is, that an assignee had been appointed. The fault with the answer, however, is that this matter is not set up as a defense. There is no notice that the defendants intended to use it as a defence. The Court might take notice that the fact existed, but it could not fail also to take notice that the defendants did not rely upon it for a defence."

[Compare § 56, etc., (what is sufficient on demurrer), and § 32, etc., (what is admitted by demurrer).]

§ 545. *Motive of pleader cannot countervail pleading.*—If an allegation or denial is properly framed to raise an issue, it must be regarded as effectual for that purpose, notwithstanding indications that the pleader had no intention of contesting the point.¹

On the other hand, if an allegation or denial in a pleading, fairly construed, is not such as to bring the fact in issue, it is not to be treated as having that effect merely because the adverse party knew that the point was in controversy, and might have expected that it would be insisted upon it at the trial.²

¹ *Youngs vs. Kent*, 46 *N. Y.*, 672; rev'g 2 *Sweeny*, 248. (The Court say: "It is possible that the pleader had it not in his mind in preparing the answer to make a point upon the quantity and value of the property, but to contest only the cause of action. But the allegations of the complaint, and the denial of the answer are upon the record, and the Court cannot, by a summary judgment, deprive the defendants of the right of a trial of the issue thus formed.")

Adams vs. Smith, 19 *Nev.*, 259; s. c., 10 *Pac. Rep.*, 353, 355. (Action to recover back money paid. LEONARD, J., says: "It is said that appellant's allegation touching the non-payment of the note was inserted for the purpose of asserting title in himself. That was probably his primary object, though it may not have been the only one. But, whatever the truth may be as to his reasons for alleging non-payment, the fact remains that he did allege it, and it shows, at least, that he did not intend to admit that the note had been paid, and consequently that the claim was false and fraudulent.")

² *Southwick vs. First National Bank*, 84 *N. Y.*, 420, 429; s. c., 61 *How. Pr.*, 164; 12 *Weekly Dig.*, 478; rev'g 20 *Hun*, 349. (EARL, J., says: "A defendant may learn outside of the complaint what he is sued for, and thus may be ready to meet plaintiff's claim upon the trial. He may even know precisely what he is sued for when the summons alone is served upon him. Yet it is his right to have a complaint, to learn from that what he is sued for, and to insist that that shall state the cause of action which he is called upon to answer; and when a plaintiff fails to establish the cause of action alleged, the defendant is not to be deprived of his objection to

a recovery by any assumption or upon any speculation that he has not been injured.”)

[*Contra*, *Coffin vs. McLean*, 80 *N. Y.*, 560. (Action at law: answer a set-off on legal grounds. The evidence showed not a legal but an equitable right of set-off which was proved against objection. *Held*, that it was available. FOLGER, J., said: “The answer set up every fact thus shown, save that of the insolvency of the principals and of that the plaintiff was apprised before the trial, and apprised also that the defendants would seek to use that fact to make out a right to set-off. We think that in the present temper of the law and the courts for reaching the merits of a litigation—without regard too much to the frame in which the pleadings have set the issue—the defence may be treated as an equitable one, and if there were need, the pleadings would now be amended to take in averments of the facts as shown on the trial.”)]

§ 546. *Formal allegations required by rule of court.*—Under the New Procedure, allegations inserted because required by statute or rule of court, although not otherwise part of the cause of action, are admitted by not being denied.

This seems to result from the ruling in *Morrell vs. Morrell*, 3 *Barb. (N. Y.)*, 236, that the denial of connivance in a bill for divorce is the proper subject of an issue; and the suggestion in *Wheeler vs. Van Keuren*, 1 *Barb. Ch.*, 490, that in a chancery suit relating to property there must be proof that the matter in dispute exceeded \$100, or a decree could not be made *pro confesso*, (and it is in accordance with the present doctrine as to such allegations of matters required by statute [see § , *Demand*]). But to the contrary was a ruling on exception to answer in *Batterson vs. Ferguson*, 7 *Barb.*, 490, where HARRIS, J., said: “I do not understand that the defendant in a creditor’s bill is bound to answer the averments that the defendant has property, etc., to the amount of one hundred dollars, or that the bill is not filed by collusion, at all. These averments are required, by a rule of the court, to be inserted in the bill, and of course it would be defective in form without them. They constitute, however, no part of the plaintiff’s case. It is not necessary for him to prove them, to entitle him to the relief sought. The rule for

determining whether an answer to any particular averment is necessary is to ascertain whether it is material to the plaintiff, to enable him to obtain the relief he seeks, to have the proof, or an admission of such averment. If the proof will avail the plaintiff in obtaining relief, he is entitled to an answer; otherwise the defendant is not bound to answer, for his answer would be immaterial. [Compare § 287, *Demurrer*.]

§ 547. *Presumption inconsistent with allegations.*—

A presumption of law in favor of a party cannot aid his pleading if it is inconsistent with his own allegations, even though they were not essential to the case made by his pleading.

[But compare §§ 50–55.]

Andrews vs. Chadbourne, 19 *Barb. (N. Y.)*, 147. (Holding that allegations in respect to time, like all other allegations, are evidence against the party making them, as his admissions. All presumptions of law in favor of a party must be consistent with his allegations. None will be indulged for his benefit in opposition to an express allegation, although such allegation may not have been essential to a statement of a good cause of action. Thus it will not be presumed that a promissory note was transferred before its maturity, when it is alleged in the complaint that the transfer was on or about a specified day which was after the note matured; and the defendant may in absence of evidence properly repose on such allegation and claim the benefit of payment to the payee before that time. Judgment therefore reversed.)

§ 548. *Inconsistent protestation does not prejudice.*—

A protestation, at Common Law, is an admission of the matter to which it is addressed, but is available only in that very action.

But if the pleading which contains it contains also allegations inconsistent with such an admission, the admission may be disregarded, as repugnant and not prejudicial to the pleader.

Briggs vs. Dorr, 19 *Johns. (N. Y.)*, 95.

§ 549. *Denial of anticipated defence does not change burden of proof.*—Plaintiff by inserting in the complaint matter not essential to his cause of action, but intended to negative an anticipated defence, does not assume the burden of proof as to that matter. But if the answer sets up that defence, the defendant must prove it.

Murray vs. N. Y. Ins. Co., N. Y., 9 Abb. N. C., 309; s. c., 85 N. Y., 236; rev'g 19 Hun, 350. (Action on life policy. The unnecessary allegation in the complaint that the death of the assured was not caused by the breaking of any of the conditions of the policy, will not, although denied by the answer, deprive the defendant of the affirmative of the issue, where the issuing of the policy is admitted, and the answer affirmatively alleges facts showing a breach of a condition. Judgment reversed for error in holding contrary.)

S. P., Coburn vs. Travelers' Ins. Co., 145 Mass., 226.

5. EXPRESS ADMISSIONS.

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| § 550. Interpretation of express admission. | § 555. Admission qualified in substance. |
| 551. Admission in notice of special matter. | 556. Admission coupled with justification or avoidance. |
| 552. — — of similar instrument. | 557. Protestation. |
| 553. Admission by tender and payment into Court. | 558. Admission of conclusion of law. |
| 554. Denial and tender. | 559. Admission denied. |
| | 560. Disclaimer; its requisites. |

§ 550. *Interpretation of express admission.*—An express admission need not be held conclusive against the party in any broader sense than its terms necessarily imply.

Jones vs. Morehead, 1 Wall. (U. S.), 155, 165. (Suit to restrain infringement of patent of lock. Answer admitted the manufacture and sale of locks. *Held*, that the language of the admission was satisfied, by assuming that the smallest number of locks were made, consistent with the use of that word in the plural, and with

the use by defendants of any part of the patent which was valid; this being consonant with the apparent justice of the case. Hence it was error to grant an injunction as to the whole of the patent, and to allow more than nominal damages.)

Gallatin Natl. Bank vs. Nashville, Chattanooga, etc., R. Co., 4 *N. Y. State Rep.*, 714. (Holding an express admission that a specified person, being then president of a corporation, "signed" a specified instrument, not an admission of his authority to sign, especially when coupled with a denial. Hence error to direct verdict as if the authority were admitted.)

Schwarz vs. Sears, *Walk. Ch. Rep. (Mich.)*, 19. (Bill to set aside foreclosure, alleging that specified payments had been made. *Held*, that as it was not alleged that these were all the payments, the admission did not preclude complainants from showing that other payments had been made. The chancellor said that admissions in a bill or answer, to be conclusive on the party making them, must be full and unequivocal. They must not be inferred from other admissions, unless the express admission is so closely connected with the one to be inferred that to disprove the latter would disprove the former.)

National City Bank vs. Westcott, 118 *N. Y.*, 468. (An admission in an answer that a check "properly endorsed" was presented for payment "as alleged in the complaint," *held*, no broader than the allegation of the complaint; and as the complaint had not charged an endorsement by the answering defendant, such endorsement was not admitted. Citing *Slocum vs. Clark*, 2 *Hill (N. Y.)*, 475; *Clark vs. Dillon*, 97 *N. Y.*, 370.)

Compare Commercial Bank of Keokuk vs. Pfeiffer, 108 *N. Y.*, 242, 252; s. c., 13 *N. Y. State Rep.*, 506. (Admission that defendants contracted with plaintiff as alleged, —an admission of plaintiff's incorporation, although incorporation was specially alleged by plaintiff, and the answer denied all allegations not admitted.)

[*Compare Miller vs. Moore*, 1 *E. D. Smith (N. Y.)*, 739, 743. (Foreclosure of mechanic's lien; answer expressly admitting that the contractor had given plaintiffs his promissory note for a specified sum, which was received by plaintiffs to be applied on account of the labor, etc., in question for which labor, etc., plaintiff claimed his lien. *WOODRUFF, J.*, said: "This is a clear admission of the performance of the work to that amount. It bears no other construction. The language of a pleading is always to be taken most strongly against the

pleader" Leave to amend by withdrawing the admission at the trial properly refused.)]
 [Compare also *Surget vs. Byers*, *U. S. Circ. (Ark.)*, *Hempst.*, 715, 719. (Holding that the rule of equity pleading that allegations neither confessed nor denied must be proved, does not apply where the statements in the answer can, by fair interpretation, be construed into an admission of or acquiescence in the allegations of material facts.)]

§ 551. *Admission in notice of special matter.*—What is unequivocally stated in a notice of special matter filed with a general denial, where the practice sanctions such notice, may be treated by the plaintiff as an admission equivalent to evidence, and will sustain a finding in his favor.

Somerset & C. R. Co. vs. Galbraith, 109 *Pa. St.*, 32, 39; s. c., 1 *Atl. Rep.*, 371; s. c., 3 *East. Rep.*, 170. (Action for causing death. Notice that deceased accepted employment under said company with full knowledge, etc., held, a sufficient admission that he was in their employment.)

§ 552. — — *of similar instrument.*—An admission expressed as relating to an instrument similar to or like that alleged, without denying the one alleged, is an admission as to the one alleged.¹

An admission of an instrument of the same designation and parties as that alleged, coupled with a mere denial that its contents are correctly stated in the complaint, is no denial, but operates as an admission of the instrument alleged.²

¹ *Millville Mfg. Co. vs. Salter*, 15 *Abb. N. C.*, 305; s. c., 21 *N. Y. Weekly Dig.*, 355; 1 *How. Pr. N. S.*, 495. (Holding that an express admission of the acceptance of a draft similar to that set forth in the complaint, dispensed with the necessity of proving the acceptance.)

² *Wallach vs. Commercial Fire Ins. Co.*, 12 *Daly*, 387.

§ 553. *Admission by tender and payment into Court.*—A tender upon the claim in suit, and paying into Court the sum tendered, absolutely admits that amount to be due; but does not admit that plaintiff is entitled to recover more, nor that he could recover anything had the tender and payment not been made.

Wilson vs. Doran, 110 *N. Y.*, 101 s. c., 15 *Civ. Pro. R.*, 96, (rev'g 46 *Hum.*, 88 and holding that to defeat plaintiff's claim to anything beyond the sum admitted, defendant could, under a denial, prove that plaintiff had no title to the cause of action. The result of the authorities is that defendant, notwithstanding tender, etc., may defend on any ground which admits the original contract or duty.)

Griffin vs. Harriman, 74 *Iowa*, 436. (Action for \$125 for use and occupation. Defendant tendered \$25. *Held*, not error to charge that plaintiff was entitled to a fair rental for so much of the land as defendant used, and after verdict for \$25 not error to refuse a new trial, asked on the ground that the answer admitted the use of all the land.)

§ 554. *Denial and tender.*—A denial of the allegations constituting the cause of action, may be set up in the same answer with a tender as a separate defence.¹

But if the tender expressly relates to only a part of the wrong or damages, the denial may be construed as confined to the other part.²

¹ *Lake Shore & M. S. Ry. Co. vs. Warren* (*Wyoming*, 1885), 6 *Pacif. Rep.*, 724. (A well-considered decision in support of allowing so-called inconsistent defences, unless one absolutely shows the falsity of the other as a matter of fact.) See §§642-649, *Inconsistency*.

Clarke vs. Lyon County, 7 *Nev.*, 75.

Berdan vs. Greenwood, 39 *L. T. N. S.*, 223.

² *Taylor vs. Chicago, St. Paul & K. C. R. Co.*, 76 *Iowa*, 753; s. c., 40 *North West.*, 84. (Holding that a denial coupled with a tender of the value of part of things alleged to be injured, was an admission as to that part, and a denial only as to the rest.)

Compare also *Spurr vs. Hall*, 37 *L. T. R. W. S.*, 313, in a case of nuisance, where such a combination would put plaintiff in a dilemma.

§ 555. *Admission qualified in substance.*—In defining the limits of the issue, an admission qualified in its very substance, and coupled with a denial of what is not admitted, must be taken with the qualification; and the allegation is not admitted except as qualified; and if the adverse party relies on the unqualified admission as dispensing with evidence, he must disprove the qualification.

Gage vs. Bissell, 119 *Ill.*, 298. (Allegation of adversary's deed as illegal, admits existence of illegal deed only.)

Garretson vs. Bitzer, 57 *Iowa*, 469. (Allegation of contract: denial of indebtedness, coupled with setting out substantially the same contract and alleging payment. *Held*, that plaintiff must prove the indebtedness.)

Gildersleeve vs. Landon, 73 *N. Y.*, 609. (Allegation by plaintiff that he purchased in good faith. Admission in answer that plaintiff purchased; but coupled with allegation that he did so with knowledge of defendant's prior mortgage. *Held*, that the statements must be taken and construed together.)

Albro vs. Figuera, 60 *N. Y.*, 630. (Complaint for goods sold, pleading delivery of specified items and admitting specified payments. Answer admitting sale to defendant of a large quantity of merchandise, and that defendant made the payments specified by plaintiff, but denying that any balance was due, and denying every allegation except as admitted. *Held*, that this put in issue the items of the account, the times of sale, and prices.)

Goodyear vs. De La Vergne, 10 *Hun*, 537. (Action for price of goods. Denial; and admission only that defendants received goods such as described from a third person and paid him. *Held*, error to direct verdict for plaintiff on proof that the goods were plaintiff's and they shipped them to defendants; and their value; for the admission of receipt was qualified by allegations that the goods came from, and were paid for to, a third person.)

Breemer vs. Burgess, 2 *Wash. T.*, 290, 296; s. c., 5 *Pac.*

Rep., 840. (Allegation of promise to pay a specified price. Admission of promise to pay that price if the goods were merchantable, etc., coupled with allegation that they were not merchantable.)

Compare Mott *vs.* Consumers' Ice Co., and other cases on the use of the adversary's pleadings as evidence against him, in *Abb. Civ. Jury Brief*, 69.

On this distinction, LANDON, J., in *Whitney vs. Town of Ticonderoga*, 53 *Hun*, 214; s. c., 6 *Supp.*, 844, says: "When regarded as a pleading, every part of the pleading is adopted, nothing extrinsic is to be considered, and, therefore, nothing is presented to impair the full force of the result which the pleader sets forth. If the avoidance is ample as pleaded, there can be no confession in the pleading which can be separated from the ample avoidance. But when the pleading is read in evidence, it is read as the declaration of the party, and takes its place as any other testimony to be considered by the jury in connection with the other testimony. The jury must determine the issues of fact upon a fair consideration of all the testimony."

§ 556. *Admission coupled with justification or avoidance.*—An admission of a fact is not deprived of the effect it has to dispense with evidence, by coupling with it distinct new matter, such as a justification or other separate avoidance of the fact.

The plaintiff in such case need not prove the fact thus admitted, and the defendant must prove the avoidance or justification.

Clements vs. Moore, 6 *Wall. (U. S.)*, 299. (Creditor's suit against husband, the debtor, and wife, his grantee. Admission in wife's answer that she paid for the property by giving up notes in which her husband was payee; coupled with an allegation that her husband transferred them to her for money lent. *Held*, that payment with her husband's securities was admitted, and their transfer to her for value must be proved.)

s. p., *Oregon Co. vs. Oreg. Ry. & Nav. Co.*, 28 *Fed. Rep.*, 505. (Allegation that instrument was executed by corporate officers in pursuance of a resolution duly passed. Admission of its execution under corporate seal, coupled with allegation that the meeting which passed the

resolution was without a quorum. The lack of quorum being traversed by reply, *held*, that the execution was admitted, subject to the question of quorum, on which the burden was on defendant.

Parker vs. Lanier, 82 *Ga.*, 216; s. c., 8 *South East. Rep.*, 57.

(Admission coupled with justification.)

s. p., *Conner vs. Keese* (*N. Y.*, 1887), 7 *Centr. Rep.*, 283.

(Sheriff's action on bond of deputy, alleging that he made a false return: answer that the deputy made a return according to the express directions of the sheriff. *Held*, an admission of having made the return, and its falsity, which dispensed with proof.)

See the Equity rule as to a distinct fact not being necessarily taken as a qualification of an admission, well stated in *Parkes vs. Gorton*, 3 *R. I.*, 27, 31.

The distinction between this and the preceding rule rests on the same principle as that which governs the proof of admissions as evidence. See *Abb. Brief on Facts*, 27, and *Rouse vs. Whited* (*there cited*), and *Prince vs. Samo*, 7 *Ad. & El.*, 627.

§ 557. *Protestation*.—The Common Law form, adopted thence in Equity, of inserting a protestation against matter not desired to be deemed admitted, has no effect in limiting admissions as to matters properly alleged by the adversary, so far as concerns their effect as admissions in the suit in which they are made.

Taylor vs. Holmes, 14 *Fed. Rep.*, 498, 501.

And an admission is none the less such because explained as founded on unwillingness to contest and a desire to buy peace. *Globe Nail Co. vs. Superior Nail Co.*, 27 *Fed. Rep.*, 454. (Infringement of patent. Answer that defendant had not been disposed to contest the claim, but chose rather to make terms, and had before suit, offered, and now offered, to pay the usual royalty,—*held*, an admission entitling complainant to a decree of validity and infringement.)

§ 558. *Admission of conclusion of law*.—An express admission of a conclusion of law, or a mixed conclusion of law and fact, stated in the pleading of the adverse party, as distinguished from failure to deny, admits all the facts necessary to support that conclusion, unless

there is an express denial of such facts coupled with the admission in such manner as to qualify its meaning.¹

But it is not conclusive on the pleader as to the question of law.²

¹ *Stephenson vs. Leesburgh*, 33 *Ohio St.*, 475. (Admission that the town suing to recover possession of streets, had been laid out and established; and a denial that the plat set forth in the petition was a correct one, and denial of all the other allegations in the petition. *Held*—1. That this, without a specific denial to the contrary, admitted all the facts averred which were essential to the legal establishment of the town and the dedication of its streets; 2. That the general denial applied only to the averments not so admitted.)

Sadler vs. Olmstead, 79 *Iowa*, 121. (One of the counts was on an award alleging facts constituting a common-law submission. The answer admitted the award, and, without attacking it in any manner, added a general denial 'except as admitted.' *Held*, error to leave to the jury the question whether there was a submission of the matter awarded on, for this was admitted by admitting the award.)

² *People ex rel. Purdy vs. Commissioners of Highways*, 54 *N. Y.*, 276. *s. p.*, *Union Bank vs. Bush*, 36 *id.*, 631. (Express allegation.) [The reason is that, as all are presumed to know the law, no one is misled.]

Cutting vs. Lincoln, 9 *Abb. Pr. N. S.*, 436.

§ 559. *Admission denied*.—A defendant whose answer denies a fact admitted in the complaint, cannot claim the benefit of the admission.

Hurd vs. Hannibal and St. J. R. R. Co., 18 *N. Y. Weekly Dig.*, 239. (Here the complaint for the price of building elevators alleged that the receipts of business—which were, by the contract, to be allowed on account—were a specified sum, and this the answer denied. *Held*, that because of the denial plaintiff could show, and the referee could find, that the receipts were less than alleged.)

Spores vs. Boggs, 6 *Oreg.*, 122. (Replevin: plea of title in third person; denial by replication. *Held*, that plaintiff was not entitled to judgment on the pleadings by

reason of defendant's disclaimer of ownership. Because if plaintiff relies upon an admission, he should not deny it.]

[*Compare* *Curl vs. Watson*, 25 *Iowa*, 35. (Holding an allegation of both parties of the same fact conclusive notwithstanding a denial by each.)]

§ 560. *Disclaimer*;—*its requisites*.—A disclaimer must show that defendant is entitled to be dismissed from the action. For this purpose it must show not only that he has no interest, but that he is under no liability,¹ and that no relief in respect to the merits can be had against him.²

It cannot be sustained if he is liable even for costs only.³

¹ *Ellsworth vs. Curtis*, 10 *Paige* (N. Y.), 105.

Graham vs. Coape, 9 *Sim.*, 93, 102; s. c., 3 *Myl. & C.*, 638; *Glassington vs. Thwaites*, 2 *Russ.*, 459. (Disclaimer of interest cannot avail to evade a liability.)

² *Isham vs. Miller*, 44 *N. J. Eq.*, 61; s. c., 14 *Atl. Rep.*, 20; s. c., 12 *Cent Rep.*, 235. (Suit to declare a deed to be only a mortgage. Disclaimer of all interest, while continuing to hold the apparent legal title, ordered off the files.)

³ *Graham vs. Coape*, 9 *Sim.*, 93, 103. (Bill by *cestui que* trust against trustees and an intermeddler; alleging that the latter had rendered the suit necessary, and praying that he be charged with its costs.)

6. ADMISSIONS BY NOT DENYING.

[As to admissions of *amount* and *value*, see § 540; of *documents*, see §§ 539, 615–636; of *jurisdictional facts*, see §].

§ 561. Immaterial allegation.

562. Defect of essential allegation.

563. — of mere conclusion of law.

564. — of conclusion of law, without denying facts.

565. Main fact, and evidentiary facts.

566. Allegation of mere evidence.

§ 567. Avoidance of anticipated defence admitted by pleading the defence.

568. — of ground of conclusive presumption.

569. Infant's answer.

570. Tacit equivalent to express admission.

§ 561. *Immaterial allegation*.—Under the usual provision in the codes that each “material” allegation in the complaint, or in a counterclaim, not controverted must be deemed true, an allegation which could be struck out without impairing the pleader’s cause of action or defence is not admitted by failure to deny it.

[According to some statutes and some decisions, allegations essential to a cause of action are “material” within the meaning of the rule. See § 536, where the question is more fully stated.]

Toland vs. Sprague, 12 *Pet. (U.S.)*, 300, 335. (*Assumpsit*: plea of statute of limitations; reply setting up an exception in the statute in favor of merchants’ and factors’ accounts, and averring also that no account whatever was ever stated or settled between the parties to the action; rejoinder by defendant that he was not plaintiff’s factor. *Held*, as the negative averment, that there was no account stated, was not a necessary part of the replication, defendant’s omission to traverse it did not admit it; and the court below did not err in submitting to the jury evidence that an account had been stated.

Brown vs. Wakefield, 1 *Gray (Mass.)*, 450. (Holding that under the Mass. Prac. Act, which provides that a “substantive fact, alleged with substantial precision and certainty,” is admitted by failure to deny,—a fact not set forth in terms clear, full, unambiguous, and with legal precision, is not admitted by failure to deny. Followed in *Tarbell vs. Gray*, 4 *Gray*, 444, 446.)

Moore vs. Murdock, 26 *Cal.*, 514. (Conversion: answer as new matter, that plaintiffs had bought the sheep at a pretended sale; also designating the place and the person who had charge of them. *Held*, that these latter allegations were mere matters of evidence; and that the replication that the sale was made in good faith and for valuable consideration, and alleging plaintiff’s possession before levy of the attachment, sufficiently put in issue the ultimate fact of ownership.)

Racouillat vs. Rene, 32 *Cal.*, 450. (Complaint to foreclose, against a subsequent purchaser, a mortgage improperly recorded, improperly alleged facts which were merely evidence of constructive notice. These facts the answer attempted to deny. After a trial in which the question of notice was regarded as an issue by both parties, *held*, that evasiveness in the denial could not avail, and that only the material allegations of the

pleadings should be regarded; and conceding the denial defective, the immaterial allegations were not admitted.) *Wood vs. Steamboat Fleetwood*, 19 *Mo.*, 529. (Allegation of value of goods, in action for breach of contract of affreightment, not being material, it was reversible error to instruct the jury that it was admitted by failure to deny it.)

Barton vs. Sackett, 3 *How. Pr. (N. Y.)*, 358. (The complaint alleged that by a certain instrument defendants had assumed the payment of certain notes held by them. The defendants denied that they intended by the instrument to render themselves liable. The plaintiff replied by setting forth the instrument. After the plaintiff had proved the agreement, etc., the defendant's counsel moved for a nonsuit because the reply did not negative the defendant's averments as to the meaning and intention of the agreement. *Held*, that the allegations as to meaning were immaterial and under the code should be disregarded on the trial, as the plaintiff was not permitted to demur.)

Oechs vs. Cook, 3 *Duer (N. Y.)*, 161. (Complaint alleged plaintiff sold defendants, "under their firm name of John Cook & Son," certain goods. The answer did not deny the partnership. At the trial defendants' evidence that they were not partners was excluded. *Held*, as the allegation of partnership was not such as would preclude the plaintiff from recovering on proving a purchase by the defendants jointly, it was not admitted by not being denied; and the defendants might show on the trial that the partnership did not exist, for the purpose of disproving delivery to them. New trial granted.)

Same rule in Equity *Story's Eq. Pl.*, 40.

By the *Colorado Civ. Code*, § 71, *Sess. Laws*, 1887, every material allegation of the complaint or answer not controverted is deemed admitted.

By the *Kansas Civ. Pro.*, § 128, *Gen. Stat.*, 1889, § 4211; the *Indiana Civ. Pro.*, *Rev. Stat.*, 1888, § 383 (110); and the *Missouri Rev. Stat.*, 1889, § 2073, every material allegation of the complaint, . . . and every material allegation of new matter in the answer not controverted, is deemed admitted.

§ 562. *Defect of essential allegation.*—A pleading which is insufficient by reason of a fatal defect in substance, is not aided by a failure to deny.

Boyce vs. Brown, 7 *Barb.*, 80, 90; aff'g 3 *How. Pr.*, 391. (Holding that the rule of the Code that averments not controverted are admitted, does not apply where the title averred itself is defective, or where in truth none is averred.)

If the bill do not make a case, no relief can be had, whatever the admissions of the answer. *Jackson vs. Ashton*, 11 *Pet. (U. S.)*, 229; *Knox vs. Smith*, 4 *How. (U. S.)*, 298.

§ 563. *Denial of mere conclusion of law.*—An allegation of a legal conclusion, without facts to support it, is not admitted by failure to deny it,¹ nor by pleading matter in avoidance.²

But if the complaint is only sustainable by treating a legal conclusion therein stated as a proper allegation, a denial which is as broad as the allegation is a sufficient issue to support judgment thereon after trial.³

¹ *Wormouth vs. Hatch*, 33 *Cal.*, 121. (Action to enforce mortgage; an averment that the defendant's land is "subject to the mortgage" is but a conclusion of law, and the failure of defendant to deny it cannot avail the plaintiff. Allegations that defendants paid, by checks, interest on the notes secured by the mortgage, and that they always admitted their liability to pay it, and the principal also, etc., being mere averments of evidence and not facts, need not be traversed. Judgment on pleading affirmed.)

Watson vs. Lemen, 9 *Colo.*, 200. (Suit on note: denial that the notes were due, denied only a legal conclusion and formed no issue. Not error to give judgment on the pleadings, for defendant would not be entitled to offer evidence disproving maturity.) [But see § 273.]

Alston vs. Wilson, 44 *Iowa*, 130. (Action to recover land: answer in effect that plaintiff's deed was "in fact but a mortgage for money advanced." *Held*, only a conclusion of law, and a reply failing to deny it did not admit it.)

Porter vs. Wormser, 94 *N. Y.*, 431.

Jordan vs. Shoe & Leather Bank, 74 *N. Y.*, 467, 471; s. c., 3 *Am. R.*, 319. (Though the matter set up in the answer be admitted as true by a failure to reply thereto, it still remains to be determined whether the courts will accede to a claim in the answer that such matter constitutes a legal right in the defendant. **A**

party is not estopped by not taking issue on a matter of law averred in his adversary's pleadings.)

s. p., *People ex rel. Purdy vs. Commissioners of Marlborough*, 54 *N. Y.*, 276; s. c., 13 *Am. R.*, 581. (Validity of statute.)

² *Alston vs. Wilson*, 44 *Iowa*, 130. (Allegation that deed was a mortgage not admitted by failure to deny, and pleading in avoidance.)

³ *Weinhauer vs. Morrison*, 49 *Hun (N. Y.)*, 500; s. c., 18 *State Rep.*, 800. And see § 535.

§ 564.—*of conclusion of law, without denying facts.*—A denial of a conclusion of law without denying facts alleged in the adversary's pleading which substantiate the conclusion, is an admission of the facts, and the conclusion follows.

Adams vs. Adams, 21 *Wall. (U. S.)*, 185, 190. (Holding that a denial in an answer in equity that defendant "delivered" an alleged deed, goes for nothing if the answer admits facts and circumstances which do in law constitute delivery,—such as that he signed and sealed it, acknowledged it before a proper magistrate, and put it upon record; facts which of themselves may, under the circumstances of the case, constitute delivery.)

Emery vs. Baltz, 94 *N. Y.*, 408. (A denial by a surety of "knowledge or information sufficient to form a belief as to whether or not the said [principal] was at the time of the commencement of this action indebted to the said plaintiff in the sum mentioned in the complaint, or in any other sum, and therefore deny the same,"—*held*, merely a denial of a legal conclusion which put no fact in issue. [Distinguishing *Goodyear vs. De la Vergne*, 10 *Hun*, 537; *Albro vs. Figuera*, 60 *N. Y.*, 630.])

Lee vs. Casey, 39 *Mo.* 383. (Plaintiff alleged that defendant owed plaintiff for goods sold and delivered, and the answer simply denied the indebtedness. *Held*, in effect an admission of the sale and delivery.)

s. p., *Thruston vs. Oldham*, 6 *Bush (Ky.)* 16.

Gale vs. James, 11 *Colo.*, 540; s. c., 19 *Pac.*, 446. (Saying that the liberal construction of pleadings provided by the Code does not mean that the courts shall supply the pleading bodily, or any substantial averment which may be wanting, or that they shall overlook or disregard the omission of a substantial averment.)

Holbrook vs. Sims, 39 *Minn.*, 122; s. c., 39 *N. W.*, 74, 140.

(Failure to deny allegation that defendants made the note in suit to plaintiff, an admission of title in plaintiff, though coupled with a denial that plaintiff was the lawful owner and holder, and though the note when produced at the trial bore an uncanceled indorsement.)

[See also *Conselyea vs. Swift*, 103 N. Y., 604.]

§ 565. *Main fact, and evidentiary facts.*—A denial of a conclusion of fact is sufficient, although mere matters of evidence which the adverse party alleged in support of it, be not denied.¹

A failure to deny the main substantive fact is an admission of it, irrespective of any denial of allegations of probative or evidentiary facts.²

¹ So if an answer alleges mere matters of evidence, a replication is good which traverses the ultimate and issuable fact which the answer was intended to aver. *Moore vs. Murdock*, 26 Cal., 514, 524.

² *Mulford vs. Estudillo*, 32 Cal., 131, 138.

§ 566.—*of allegation of mere evidence.*—An allegation of matters merely amounting to evidence, instead of an allegation of the fact which such evidence might serve to prove, is not admitted by the failure to deny the matters so alleged.

Racouillat vs. Rene, 32 Cal., 450.

Dexter vs. Moody, 36 Minn., 205 ; s. c., 30 *North West. Rep.*, 667. (*Dictum*, approving the last case, but holding the rule to be otherwise where the answer is so framed as to indicate an intention to take advantage of the matters of evidence so alleged.)

Siter vs. Jewett, 33 Cal., 92. (Holding that a derangement of title, only material as showing, whether the grantee took subject to a mortgage or free from it, is matter of evidence only, and not admitted by failure to deny.)

So also of argument and inference, *Story's Eq. Pl.*, 40, citing *Merry vs. Plainfield*, 45 N. H., 126.

Willard vs. Williams, 7 Gray (Mass.), 184. (Allegation of money received "by the defendant by his agent B.:" answer that defendant "never by himself or agent re-

ceived the money or any other sum," etc. *Held*, that the agency of B. was not admitted because a mere statement of evidence by which plaintiff proposed to prove his cause of action, and unnecessary. BIGELOW, J., said: "It would manifestly lead to great confusion and prolixity in pleadings—evils which the Practice Act was especially intended to prevent—if a plaintiff could be allowed to incumber his declaration with averments of matters of proof, and thereby compel a defendant to deny them.")

[For the Mass. rule that failure to deny admits only the substantial part of the allegation, see *Woodbury vs. Jones*, 3 *Gray (Mass.)*, 261; *Kellogg vs. Inhab. of Northampton*, 4 *id.*, 65.]

§ 567. *Avoidance of anticipated defence admitted by pleading the defence.*—In Equity, if the bill of complaint sets up an anticipated defence and alleges matter in avoidance, an answer setting up that defence and not denying the facts alleged in avoidance admits those facts.¹ The same principle has been indirectly recognized at Common Law.²

It is the better opinion that the same principle is fully applicable under the New Procedure.³

¹ *Harris vs. Knickerbocker*, 5 *Wend. (N. Y.)*, 638; rev'g 1 *Paige*, 209. (Bill for specific performance of oral contract, setting up circumstances taking it out of the statute of frauds. Defendant cannot avail himself of the statute, unless he traverses the anticipatory avoidance.) s. p., *Kane vs. Bloodgood*, 7 *Johns. Ch.*, 90, 132, aff'g 8 *Cow.*, 360; *Albany City Bank vs. Dorr*, *Walk. Ch. (Mich.)*, 322.

Bogardus vs. Trinity Ch., 4 *Paige*, 178, aff'd in 15 *Wend.*, 111. (Holding plea not rendered double by insertion of averments, which are necessary to exclude conclusions from allegations in the bill, intended to defeat the bar which might be set up; for on argument of a plea, every fact stated in the bill, not denied by plea and answer in support, must be taken as true.)

For the right to do so, anticipate and avoid a defence, in Equity, see also *Stafford vs. Brown*, 4 *Paige*, 88, holding such matter proper in the charging part of the bill; and *Hawley vs. Wolverton*, 5 *id.*, 522, in which last case it was held error to strike out such matter.

Also, Rules of U. S. Pr. in Eq., No. 21, which makes such matter proper in the narrative part or allegations of cause of action, by this clause: "And the PLAINTIFF *may*, in the narrative or stating part of his bill, state and *avoid*, by counter-averments, at his option, any matter or thing which he *supposes will be insisted upon by the defendant by way of defence* or excuse to the case made by the plaintiff for relief."

* *Somerville vs. Stewart* (N. J., 1886), 4 *East. Rep.*, 535, 536.

(The Court say: "Where a payment or performance is known and admitted, it is the better practice in declaring on contracts to pay money, deliver goods, or perform work, expressly to admit part payment, or partial performance, on the face of the declaration, to deprive the defendant of all pretence to plead such defence." *Ch. Pl.*, 288, 338. *Dictum.*)

1 *Chitt. Pl.*, 16 *Am. Ed.*, 629, saying that when matter which operates as an estoppel appears on the face of the declaration, a plea of the matter thus shown to be excluded by the estoppel is bad on demurrer.

* The better view is that the substantial right secured by the equity practice is preserved by the Code, and that the plaintiff has a right in a legal as well as in an equitable action (as he clearly has the right in a bill in equity) to state an anticipated defence and allege the facts which he relies on as constituting an avoidance, so as to compel the defendant to admit or deny such facts. One object of the merger of legal and equitable forms of pleading, and entitling plaintiff to a verified answer, was to secure this part of the benefits of discovery without its prolix and tedious forms. And even if plaintiff is to be put to an examination before trial, in order to probe the conscience of the defendant, he is entitled to allege the facts he wishes to prove, as a basis for that proceeding. See note in 25 *Abb. N. C.*, 120.

In *Bracket vs. Wilkinson*, 13 *How. Pr.*, 102 (on motion to strike out such matter), E. DARWIN SMITH, J., says: "The plaintiff had a right to set forth these matters, so as to call upon the defendants to answer the same, and thus narrow the issue to be tried at the circuit to the fewest possible points. If the defendant cannot deny these allegations, and verify his answer, he can make no defence; but he might perhaps have answered, setting up the giving and receiving the note or the check in payment, and have verified his answer. In this way, the plaintiff might have been long delayed in getting his cause to a trial, when there was, in fact, no actual defence."

Hopkins vs. Ward, 67 *Barb.* (N. Y.), 452. (Here plaintiff pleaded a note, and, anticipating that defendant would plead a bankrupt's discharge, alleged in a second count that plaintiff held defendant's note, and defendant, being so indebted to plaintiff, on a specified day promised to pay it. *Held*, that defendant by pleading a discharge granted prior to the date of the new promise, without denying the new promise, admitted the new promise.)

People ex rel. Cornell vs. Knox, 38 *Hun.*, 236, 240. (*Quo warranto*. *Held*, that though it is unnecessary for the people to allege the defect in defendant's claim to the office, if they do and defendant fails to deny the allegation, it stands admitted.)

s. P., *Wyrick vs. Weck*, 68 *Cal.*, 8; s. c., 8 *Pacif. Rep.*, 522. (Holding that where plaintiff, instead of leaving it to defendant to plead that he took as *bona fide* purchaser without notice, alleged that defendant had the legal title, but took it with notice, the burden was on plaintiff to give evidence of notice.)

The principle to be applied under the Code is well illustrated in the able opinion of WOODRUFF, J., in *Winsted Bank vs. Webb*, 39 *N. Y.*, 325; aff'g 46 *Barb.*, 177.

[*Contra*, *Sands vs. St. John*, 36 *Barb.*, 628; 633, s. c. 23 *How Pr.*, 140. (Complaint alleged excuse for not suing within the time limited by the statute. *Held*, on demurrer, that the allegation was not admitted.)]

[*Canfield vs. Tobias*, 21 *Cal.*, 349. (Case submitted on the pleadings. *Held*, that the anticipated defence was not admitted; hence judgment for plaintiff reversed.)]

[*Doyle vs. Franklin*, 48 *Cal.*, 537.]

This was the settled rule in equity; and its justice and convenience under the Code are obvious. See Note in 25 *Abb. N. C.*, 120.

§ 568.—*of ground of conclusive presumption*.—Failure to deny an allegation of a fact from which the law raises a conclusive presumption, admits both the fact alleged and the fact so presumed, and precludes giving effect to any allegation to the contrary.

Scofield vs. McDowell, 47 *Iowa*, 129. (Admission that a tax deed was executed, *held*, a conclusive admission of its validity, because the statute made such deed conclusive evidence that due proceedings had been taken, although the admission was coupled with an allegation that the sale was made without due advertisement.)

But compare § 547.

§ 569. *Infant's answer*.—The failure of an infant, by or on behalf of whom a pleading is put in, to deny an allegation of the adverse party, is not an admission of its truth; but the allegation, if material, must be proved as if it had been denied.

Lubé Eq. Pl. Sumn. & W. ed., p. 81. (Stating that an infant is under protection of the court, and not bound by an admission.)

[But evidence of new matter, on the part of an infant, is not admissible unless pleaded. *Roe vs. Angevine*, 7 *Hun* (N. Y.), 679 (avoidance); *Mullenbrinck vs. Pooler*, 4 *N. Y. State Rep.*, 127 (counterclaim).]

[In *Varner vs. Rice*, 44 *Ark.*, 236, judgment on partition was reversed because the answer of a guardian *ad litem* was general, instead of denying everything prejudicial to the infant, irrespective of its truth. *s. p.*, *Morris vs. Edmonds*, 43 *id.*, 427; *Driver vs. Evans*, 47 *id.*, 297.]

The *Iowa Code* (*Miller*, 1888, § 2656) also requires a denial of all the material allegations prejudicial to the minor, lunatic or prisoner.

The *Kentucky Code*, *Carroll*, 1888, § 126 (153), puts at issue allegations against a defendant under any disability except coverture.

§ 570. *Tacit equivalent to express admission*.—Under the New Procedure, failure to deny an issuable allegation, if such as to constitute an admission under the statute which provides that “each material allegation of the complaint not controverted by the answer . . . must for the purposes of the action be taken as true,” is, for the purpose of defining the issue raised by the defence containing such admission, equivalent to an express admission of the allegation in question.

Fleischmann vs. Stern, 90 *N. Y.*, 110; *s. c.*, 15 *Weekly Dig.*, 274, aff'g 24 *Hun*, 265; *s. c.*, 61 *How. Pr.*, 124 (citing *Tell vs. Beyer*, 38 *N. Y.*, 161; *West vs. Am. Exch. Bk.*, 44 *Barb.*, 175; *Marston vs. Swett*, 66 *N. Y.*, 206, 210; *s. c.*, 23 *Am. Rep.*, 43, rev'g 4 *Hun*, 153; *s. c.*, 6 *Supreme Ct.*, (*T. & C.*) 543; *Paige vs. Willets*, 38 *N. Y.*, 28, and holding, therefore, that the failure of a defendant sued

upon a note to deny allegations in the complaint specifically stating an adequate legal consideration, precludes him from availing himself of a defence set up in his answer that the note was usurious.

[The application of this rule, made in the above case to defeat the defence of usury because it did not contain a denial of the contract as alleged by plaintiff, has been thought by some inconsistent with the previous case of *Newell vs. Doty*, 33 *N. Y.*, 83, 92, where a plea of usury was sustained without any denial; but the decisions seem to be consistent and both correct, when it is noticed that in *Newell vs. Doty* there appears to have been in plaintiff's complaint no other allegation of consideration than the general one of "value received" implied in pleading a promissory note; and defendant did not controvert the receiving of value, but alleged that such value was usurious. While in *Fleischman vs. Stern* plaintiffs specifically alleged a consideration adequate in amount, and the defence of usury therefore required a denial of legal consideration.]

[Express admissions are sometimes more effective.]

In equity, if some answer was made, failure to deny a particular allegation is not an admission (except for the purposes of a motion for injunction), but is considered in aid of plaintiff's evidence. *Commercial Mut. Mar. Ins. Co. vs. Union Mut. Ins. Co.*, 19 *How. (U.S.)*, 318; *Young vs. Grundy*, 6 *Cranch (U. S.)*, 51.

Miles vs. McCallan (Ariz.), 3 *Pacific Rep.*, 610. (FRENCH, Ch. J., says: "The silence of the answer as to any allegation of the complaint effects precisely the same result and shortens and simplifies the pleadings. What is not denied is admitted, and there can be no reason for expressly admitting it.")

But an admission is not equivalent to an allegation. *Curtiss vs. Livingston*, 36 *Minn.*, 312; s. c., 30 *North West. Rep.*, 814; and see § 541.

7. FORM OF DENIAL; AND ADMISSIONS BY BAD DENIAL.

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| <p>§ 571. The words of denial.</p> <p>572. "Says he denies."</p> <p>573. Denial of legal conclusion.</p> <p>574. Denial of each and every allegation.</p> <p>575. Denial of "material" allegations.</p> <p>576. — general denial when an admission.</p> <p>577. — under statutes not allowing general denial.</p> <p>578. Specific denial, what is.</p> <p>579. Unspecific denial.</p> <p>580. Disregarding lack of specificness.</p> <p>581. Denial of all allegations on a particular subject.</p> <p>582. Sweeping denial, with exception as to what is otherwise answered.</p> <p>583. — — with exception of specified folios.</p> <p>584. Denial by reference to numbered paragraphs.</p> <p>585. Denial of specific sum.</p> <p>586. Denial involving non-essential circumstances.—Negative pregnant.</p> <p>587. Negative pregnant.</p> <p>588. Evasive denial,—not covering the allegation.</p> <p>589. Addition of hypothetical or contingent avoidance.</p> <p>590. Conjunctive denial of conjunction.—Negative pregnant.</p> | <p>§ 591. Disjunctive denial.</p> <p>592. Surplusage in denial.</p> <p>593. Refusal to admit.</p> <p>594. Mere call for proof.</p> <p>595. Submission to court.</p> <p>596. Admission of some such a contract admits correctness.</p> <p>597. Denial of correctness of copy.</p> <p>598. Craving leave to refer.</p> <p>599. Direct allegation to contrary.</p> <p>600. Different version not a denial.</p> <p>601. Giving different version does not change burden of proof.</p> <p>602. Different version coupled with denial.</p> <p>603. Denial upon information and belief.</p> <p>604. State Court practice in Federal Court.</p> <p>605. Denial of knowledge or information sufficient, etc.</p> <p>606. — except from specified sources.</p> <p>607. — and therefore denies the same.</p> <p>608. Denial in alternative in respect to knowledge, etc.</p> <p>609. Matters presumptively within the pleader's knowledge.</p> <p>610. Jurisdiction.—General denial of citizenship.</p> <p>611. — denial of citizenship; under New Procedure,</p> <p>612. — form of denial of citizenship.</p> <p>613. — time of citizenship.</p> <p>614. Burden of proof as to jurisdiction.</p> |
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§ 571. *The words of denial.*—The word "deny" is not essential. Any form of express denial is sufficient which distinctly controverts a specific allegation, so that if the allegation be true, perjury may be assigned upon the false denial if in a verified pleading.

Henny Buggy Co. vs. Patt, 73 *Iowa*, 485; s. c., 35 *North West. Rep.*, 587. (Holding that to "controvert" is to deny.)

A denial expressed thus—[Defendant] denies all the allegations in the [answer] which charge [plaintiff] with conspiring with, etc., to, etc., characterizing the charge thus generally is properly treated as a denial, at the trial. *Herdman vs. Marshall*, 17 *Nebr.*, 252; s. c., 22 *North West. Rep.*, 690, 692. This is only a liberal construction in furtherance of justice.

s. p., *Academy of Music vs. Hackett*, 2 *Hilt. (N. Y.)*, 217.

But it was a rule at common law that if the allegation to be met is a negative allegation, it must be met by an affirmative or by denying an affirmative; as for instance where defendant pleaded that he requested the plaintiff to deliver an abstract of his title, but that the plaintiff did not, when so requested, deliver such abstract, but neglected and refused so to do, the plaintiff cannot reply "that he did not neglect and refuse to deliver such abstract," but should reply, either denying the request, or affirmatively, that he did deliver the abstract. 1 *Chitt. Pl.*, 16 *Am. ed.*, 684.*

Compare *Hummel vs. Moore*, 25 *Fed. Rep.*, 380; s. c., 20 *Reporter*, 777; and *Watkins vs. Southern Pacif. R. Co.*, 38 *Fed. Rep.*, 711; s. c., 4 *Law, R. A.*, 239.

It is not enough that words manifesting intent to deny are used. There must be an actual denial. *Edward vs. Lent*, 8 *How. Pr. (N. Y.)*, 28.

§ 572. "*Says he denies.*"—A denial expressed thus—"The defendant says he denies that," etc.—is sufficient even in a verified pleading.

Jones vs. Ludlum, 74 *N. Y.*, 61. (The Court say: "It is a good general denial. A party using such language must be held to have intended a general denial, and could be held responsible for such a denial, made under oath, upon an indictment for perjury in case of its falsehood. It is the same as if the reply had been as follows: 'The plaintiff, for a reply to the answer, uses the following language: He denies,' etc.")

Contrary authorities are cited and disproved, but the appeal was dismissed on other grounds. If such a denial is not deemed sufficiently specific, the better practice is to move against it.)

Meehan vs. Harlem Savings Bank, 5 *Hun*, 439. (The denials here were, in form, that the defendants "say

that they have no knowledge or information sufficient to form a belief as to the truth of," etc., and "aver the truth to be that they are entirely ignorant and uninformed, and have not any knowledge or information sufficient to form a belief, whether or not," etc. *Held*, sufficient. DANIELS, J., said: "It is not that the term 'denies,' or 'denial,' may be made use of in the pleading, but simply that there shall be, when that form may be the one adopted, a denial in fact of any knowledge or information thereof sufficient to form a belief. (Code, § 149.). . . . There can be no essential difference between the statement that the defendant has not any knowledge, etc., and the one made that it had no knowledge, etc.; for the latter, equally with the former, is a denial of the existence, on the part of the defendant, of any knowledge or information sufficient to form a belief.")

s. p., *Wadleigh vs. Marathon County Bank*, 58 *Wis.*, 546; s. c., 17 *North West. Rep.*, 314, 316.

[*Contra*, *Powers vs. Rome, Watertown, etc., R. R. Co.*, 3 *Hun* (N. Y.), 285; s. c., 5 *Supm. Ct. (T. & C.)*, 449. But this case so far as the decision was placed on the authority of cases holding that "says he denies" is not a good denial, is in effect overruled in *Jones vs. Ludlum*, above.]

§ 573. *Denial of legal conclusion.*—A denial so expressed that it controverts only a legal conclusion, does not raise an issue.

Callanan vs. Williams, 71 *Iowa*, 363; s. c., 32 *North West. Rep.*, 383.

Merrigan vs. English, 9 *Mont.* 113. (Denial of indebtedness; and denial that the facts gave any lien.)
[For other authorities see § 533.]

§ 574. *Denial of "each and every allegation."*—A denial expressed as of "each and every allegation in the complaint," is not objectionable as a negative pregnant;¹ and is good unless the statute of the State requires a specific denial.

Otherwise of a denial of knowledge or information sufficient to form a belief² as to each *and* every allegation, etc.

¹ *Stone vs. Quaal* (1886), 36 *Minn.*, 46, 29 *North West. Rep.*, 326.

Boston Relief & Submarine Co. vs. Burnett, 1 *Allen*, 410.

² *Waters vs. Curtis*, 13 *Daly* (*N. Y.*), 179. (Dictum.)

§ 575. *Denial of "material" allegations.*—A denial expressed to be of "all the *material* allegations," or of "each material allegation," in the adversary's pleading, if not objected to before trial, may be treated as sufficient on the trial.

Collins vs. Trotter, 81 *Mo.*, 275. [Citing *Edmonson vs. Phillips*, 73 *id.*, 57, where it was held that the objection could not avail when first taken on appeal.]

In *Goodridge vs. Union Pac. Ry. Co.* (*Civ. Ct. D. Colo.*), 37 *Fed. Rep.*, 182, it was held sufficient on demurrer. *s. p.*, *Lewis vs. Coulter*, 10 *Ohio St.*, 451.

But it is certainly equally objectionable as other forms of denial which involve questions of legal construction, see §§ 578–582. And is obnoxious to a motion to make more definite and certain. *Kimball vs. Stanton County*, 4 *Fed. Rep.*, 325; *Mattison vs. Smith*, 1 *Robt. (N. Y.)*, 706; *s. c.*, 19 *Abb. Pr.*, 288; *Montour vs. Purdy*, 11 *Minn.*, 384).

§ 576. — *general denial when an admission.*—Under statutes providing that it shall not be sufficient in case of particular allegations—such as a general allegation of due performance of conditions precedent, or of official capacity, etc.—to controvert in terms contradictory of the allegation, but the facts relied on shall be specifically stated,—a general denial, without more, admits such allegation.

Halferty vs. Wilmering, 112 *U. S.*, 713. (Under Iowa statute.)

In the following list of states having such statutes, the jurisdictions where mere denial is not sufficient, but specific allegation of particulars of non-performance is required, in order to put performance in issue, are in italics. In others, the pleader met by a denial must prove the particulars he was excused from alleging.

Arizona,
Arkansas,
California,

Colorado
Florida,
Idaho,

Indiana,
Iowa,
 Kansas,
 Massachusetts,
 Michigan,
 Minnesota,
Mississippi,
 Missouri,
 Nebraska,
 Nevada,
New Jersey,

New York,
 North Carolina,
 North Dakota,
 Ohio,
 South Carolina,
 South Dakota,
 Utah,
 Washington,
 Wisconsin,
 Wyoming.

See the statutes collected under § 183, DEMURRER FOR INSUFFICIENCY.

§ 577. — *under statutes not allowing general denial.*— Under a statute which requires specific denials,¹ a denial general in form is not made specific by adding a statement that each allegation covered by it is to be taken as specifically denied.²

But the Court has power to allow an amendment, by adding a specific denial, and may do this even after the close of plaintiff's testimony, if it does not cause surprise or prejudice.³

¹ *Arkansas*—*Mansf. Dig. Stat.*, 1884, § 5072. (Material allegations in a complaint not *specifically* controverted; and, in an answer constituting a counterclaim or *set-off*, and not specifically controverted; are admitted.)

Minnesota—*Stat. Kelly*, 1891, § 4781. (Material allegations in the complaint not *specifically* controverted in the answer; and material allegations of new matter in the answer not controverted by the reply as prescribed; are admitted.)

Californian—*Civ. Pro., Deering's Anno. Codes*, 1886, § 437.

Montana—*Comp. Stat.*, 1887, § 89, and *Nevada*—*Civ. Pro.*, § 86, *Gen. Stat.*, 1885, § 3068, call for specific denial, if the complaint be verified.

² *Hensley vs. Tartar*, 14 *Cal.*, 508 (reversing judgment of nonsuit, which was granted because plaintiff offered no evidence to support such allegations).

³ *Robinson vs. Hartridge*, 13 *Fla.*, 501. (Common-law case. *Held*, that such amendment might be so allowed if it appear necessary in order to present the controversy existing before the trial.)

§ 578. *Specific denial, what is.*—A denial is specific, within the meaning of the Codes, and raises an issue, if it specifies what is denied with sufficient clearness and certainty to dispense with debatable analysis of phraseology, and preclude all discussion and doubt as to what is intended to be denied.

The requirement of the Codes for “a general or specific denial” has led some to suppose that every attempted denial must of necessity be either general or specific; and in the earlier cases definitions attempting to draw a line between the two are found. But the intent of the statute is that the denial, to be sufficient, must be general, that is, covering the whole or substantially the whole of a cause of action, or must be specific, pointing out, without leaving room for argument, what part is denied and what is not denied; and there may be denials that are bad because they are neither the one nor the other, but purport to deny a part without specifying distinctly what part.

A denial specifying a paragraph of the cause of action by the number prefixed to that paragraph in the original complaint, is good. A denial specifying by folios, if specifically indicating the precise extent of the extract, may be good in the trial court; but the practice of changing the folioing on printing an appeal book makes it bad in an appellate court. See §§ 583, 584.

See Note in 15 *Abb. N. C. (N. Y.)*, 282, where the cases are collected; and see § 582, *below*.

In *Tracy vs. Baker*, 38 *Hun (N. Y.)*, 263, 265, BOCKES, J., says: “The test to be applied to a case like the present [denial of all not hereinbefore admitted], deducible from all the decisions as declared in the note to *Clark vs. Dillon* (15 *Abb. N. C.*, 282), and which seems reasonable, is this: ‘That a defendant may use this form when the excepted denials are so specific as to clearly point out the allegations of the complaint to which they were intended to apply.’”

§ 579. *Unspecific denial.*—A denial of parts of the adversary’s allegations, which does not point to the allegations intended to be denied, so specifically as to identify them at once without argument or explanation, may be treated as an admission.

Note in 15 *Abb. N. C. (N. Y.)*, 282, and see *Baylis vs. Stimson*, 110 *N. Y.*, 621; s. c., *N. Y. State Rep.*, 175; aff'g 53 *N. Y. Super. Ct. (J. & S.)*, 225.

For other authorities see § 582.

As this rule rests on its necessity for the convenience of the Court, and to prevent misleading the adversary, it is not error for the Court in its discretion to take time to compare with the complaint an answer that does not satisfy the rule, and determine what was intended to be put in issue, provided there is no surprise or prejudice to the adversary. See, for instance, *Crane vs. Crane*, 43 *Hun*, 309; *Gallatin Natl. Bk. vs. Nashville, Chattanooga, etc., R. R. Co.*, 4 *N. Y. State Rep.*, 714; and cases in following notes.

§ 580. *Disregarding lack of specifcness.*—It is not error for the Court in its discretion, and in furtherance of justice, to disregard a lack of specifcness in a denial, if the adverse party has raised no objection before trial, and is not surprised or prejudiced.

Burley vs. German American Bank, 111 *U. S.*, 216, 220.

Spies vs. Roberts, 50 *N. Y. Super. Ct. (J. & S.)*, 301; s. c., 19 *Weekly Dig.*, 505.

The appellate court should not entertain the objection if it was not made at the trial. *Herdman vs. Marshall*, 17 *Nebr.*, 252; s. c., 22 *North West. Rep.*, 690, 692.

§ 581. *Denial of all allegations on a particular subject.*—A denial expressed to be of "all allegations which charge the defendant with" a specified liability or wrong, is a sufficient denial for the purpose of requiring evidence at the trial.

N. Y. Academy of Music vs. Hackett, 2 *Hilt. (N. Y.)*, 217. (Allegation in a complaint for rent, that "the rent was, as it became due, duly demanded." Denial of "each and every allegation in the complaint, wherein and whereby defendant is charged with being liable for any rent to the plaintiffs, or of any sum being due or owing from him to them,"—*held*, sufficient to put the making of demand in issue.)

s. p., *Herdman vs. Marshall*, 17 *Nebr.* 252; s. c., 22 *North West. Rep.*, 690, 692.

Nunnemacker vs. Johnson, 38 *Minn.*, 390.

In *McConville vs. Gilmour* (*Cir. Ct. S. D. Ohio*), 36 *Fed. Rep.*, 156, *held*, in an action at law tried by stipulation without a jury, that an answer to a petition on a partnership promissory note, setting out that defendants, "not having access to the notes," "deny all allegations thereabout," does not put in issue the partnership, as the denial must be, whether general or specific, so certain that, if untrue, a prosecution for perjury would lie.

§ 582. *Sweeping denial, with exception as to what is otherwise answered.*—A denial expressed as a denial of whatever is not herein qualified,¹ or explained,² or of what is not herein admitted,³ or herein controverted,⁴ or specifically denied,⁵ is a good denial, if there is no uncertainty as to what it is that the pleader thus has excepted.⁶

When such a denial is recognized by the trial court as putting the adverse party to his proof, if contention arises as to what is to be deemed excepted from the denial, the sweeping denial is to be construed as narrow; and the exception is to be construed broadly, as an admission; and whatever can be said in any sense to be "explained" or "admitted" or "qualified" (or otherwise according to the phrase used), even though it has not been effectually met, stands admitted.⁷

A denial expressed to be of "all contrary hereto" or "inconsistent herewith" may be held bad, as uncertain.⁸

A denial of what is not herein "avoided" is held bad; for whether an allegation is avoided or not is matter of law.

¹ *Miller vs. McClosky*, 9 *Abb. N. C.*, 303; s. c., 1 *Civ. Pro. R.*, 252.

McEnroe vs. Decker, 58 *How. Pr.*, 251. (Application to vacate injunction.)

Jellison vs. Halloran, 40 *Minn.*, 485; s. c., 42 *North West. Rep.*, 392.

² *Clark vs. Dillon* (*below cited*).

³ *Burley vs. German-American Bk.*, 111 *U. S.*, 216. (Opin. by BLATCHFORD, J.)

Gallatin Natl. Bk. vs. Nashville, Chattanooga, etc., R. R.

Co., 4 *N. Y. State Rep.*, 714. (Reversing for error in not treating it as a good denial.)

⁴ *Griffin vs. Long Island R. R. Co.* (*below cited*).

⁵ *Haines vs. Herrick*, 9 *Abb. N. C.*, 379.

⁶ *Griffin vs. Long Island Railroad Co.*, 101 *N. Y.*, 348; s. c., 2 *Centr. Rep.*, 382; 9 *Civ. Pro. R.*, 84. (EARL, J., said: "What had been before admitted and controverted was clearly specified, and hence there was no doubt or confusion as to the application of this general denial; and this answer is not, therefore, condemned by the decision in *Clark vs. Dillon*, 97 *N. Y.*, 370.")

s. p., *Boston Relief & S. Co. vs. Burnett*, 1 *Allen (Mass.)*, 410; *Matteson vs. Ellsworth*, 28 *Wisc.*, 254.

[*Compare Long vs. Long*, 79 *Mo.*, 644. (Holding an indefinite denial of this kind, obnoxious to motion.)]

Even when such an answer is sufficient to raise an issue at the trial, if no claim be there made that it is a denial, it may not serve to sustain objection in the appellate court. *Pennsylvania Coal Company vs. Blake*, 85 *N. Y.*, 227.

⁷ *Clark vs. Dillon*, 97 *N. Y.*, 370; s. c., with note, 15 *Abb. N. C.*, 261, aff'g 11 *Daly*, 110. (Holding that if new matter in the answer goes to qualify even the legal effect of allegations in the complaint, such allegations are not traversed by a subsequent general denial in the same answer of allegations not thereinbefore "admitted, *qualified* or denied." [Distinguishing *Allis vs. Leonard*, 46 *N. Y.*, 688; s. c., 22 *Alb. L. J.*, 28.]

McLeod vs. Maloney, 3 *N. Y. Supp.*, 617; s. c., 20 *State Rep.*, 468. (Such a denial held to admit whatever anything in the answer could be said to explain.)

Pullen vs. Wright, 34 *Minn.*, 314; s. c., 26 *North Western Rep.*, 394. (A denial of all allegations not previously specifically denied is not to be construed as a denial of an allegation which the previous part of the answer purports to deny, although unsuccessfully by reason of a defect in the mode of denial. Thus if a denial is bad because of a negative pregnant, it nevertheless has the effect to except the allegation to which it is addressed from the reach of a subsequent general denial of all allegations not already specifically denied; because the pleader cannot be allowed to experiment. His intent to deny is indicated, though the denial be bad because evasive.)

Commercial Bank of Keokuk, Iowa, vs. Pfeiffer, 108 *N. Y.*, 242; s. c., 13 *N. Y. State Rep.*, 506. (Holding that a denial of allegations not admitted does not deny

those *impliedly* admitted. Here the complaint alleged that plaintiff was a corporation organized and existing under the laws of another State, and that defendant entered into a contract with it; and the answer did not expressly deny the averments in respect to plaintiff's incorporation, but admitted that they contracted with it as alleged in the complaint. *Held*, that they thereby impliedly admitted plaintiff's corporate existence; and that it was not put in issue by a general denial of averments in the complaint, not admitted. Hence the objection that the complaint should have been dismissed on the ground that plaintiff failed to prove its incorporation, was unavailing. Judgment affirmed.)

Potter vs. Smith, 70 N. Y., 299. (Complaint for trespass alleging title and possession in plaintiff. Answer alleged that defendant owned lands adjoining said lands of plaintiff, and had a right of way which he entered to remove obstructions from; and denied all allegations "except as hereinbefore answered." *Held*, an admission of plaintiff's title and possession, because defendant had "answered as to it.")

Ensign vs. Ensign, 47 Hun, 631; s. c., 14 N. Y. State Rep., 181. (In an action to have a deed declared a mortgage, where the complaint alleged plaintiff's ownership, and the answer, without denying this allegation, alleged that prior to a certain date the plaintiff was owner only as he derived his right from a certain will,—*held*, that the allegation of ownership was admitted, notwithstanding a denial, at the end of the answer, of "any other allegation in the complaint not heretofore denied or answered unto." The allegation of ownership must by such an answer be deemed "answered unto" by reason of the reference in the answer to the ownership. Judgment affirmed.

[Compare Curtiss vs. Livingston, 36 Minn., 312; s. c., 30 North West. Rep., 814. (Denial of everything not herein expressly admitted, denies what had been impliedly admitted, although its admission was necessary to make out defendant's case.)]

⁸ Hammond vs. Earle, 5 Abb. N. C., 105.

Richardson vs. Smith, 29 Cal., 529. (A denial expressed to be of all allegations not consistent with the answer, is not a good denial if the other parts of the answer do not amount either to a good denial or a good defence.)

§ 583. — — *with exception of specified folios*.—A denial which specifies the parts of the adversary's plead-

ing intended to be denied, or intended to be excepted from a sweeping denial of all the rest, merely by referring to the folios where or between which they are to be found, does not comply with the statute, and will not serve to present any question in an appellate court.

Caulkins vs. Boulton, 98 *N. Y.*, 511; s. c., 21 *Weekly Dig.*, 333. (The Court say: "The answer . . . is so drawn that we cannot discover from the record how much of the complaint is admitted and how much denied.")

Crosley vs. Cobb, 3 *How. Pr. N. S. (N. Y.)*, 37; s. c., 22 *Weekly Dig.*, 570.

Varnum vs. Hart, 47 *Hum.*, 18. Both these cases hold that where references are only thus made, and the folios in the appeal book do not correspond with those in the original complaint, the appellate court will not consider anything turning on the question what was or what was not admitted.

Baylis vs. Stimson, 110 *N. Y.*, 621; s. c., 16 *N. Y. State Rep.*, 175; aff'g 53 *Super. Ct. (J. & S.)*, 225. (The Court say: "The answer should disclose the defence, whether it be by denial or new matter, without reference to any other pleading; it should be complete in itself and require neither amplification nor patching from fragments of the complaint.") [The first clause of this statement is contrary to the Equity practice, and to the weight of authority under the codes.]

Avery vs. N. Y. Central, etc., R. R. Co., 6 *N. Y. Supp.*, 547. (The Court say, on appeal from an order on demurrer to reply: "If the question presented by this demurrer involved the allegations in question, we should decline to examine them, as presenting nothing intelligible.")

§ 584. *Denial by reference to numbered paragraphs.*—Where the paragraphs of the adversary's pleading are numbered, a denial expressed as a denial of each and every allegation contained in certain paragraphs, specifying thereby their numbers, is good.

Thompson vs. Erie R. Co., 45 *N. Y.*, 468.

Allis vs. Leonard, 46 *N. Y.*, 688; Note in 15 *Abb. N. C.*, 276.

§ 585. *Denial of specific sum.*—To an allegation of

amount or value, a specific denial of that sum merely, and without alleging a different sum, is not available as a denial.

[The reason is that the most trifling difference would justify it.]

Burt vs. McKinstry, 4 *Minn.*, 204, 213. (Allegation that the property was worth \$75,000 and more. Denial that it was worth \$75,000, adding merely that there was at the time in question little sale for property, *held*, no issue, but an admission that the value was 75,000.)

But to an allegation of a specified sum, an answer stating that the sum was a specified less sum "and no more," is a sufficient denial, and is not impaired by a further allegation that the excess, if any, was contrary to instructions.

Simmons vs. Sisson, 26 *N. Y.*, 264.

Iowa Rev. Code (Miller), 1888, § 2701, provides that, "In all cases in which a denial is made by answer or reply concerning a time, sum, quantity, or place alleged, the party denying shall declare whether such denial is applicable to every time, sum, quantity, or place, and if not, what time, sum, quantity, or place he admits."

Mass. Pub. Stat. 1882, c. 167, § 19, is the same, except it applies to denial made by "answer, affidavit, or otherwise," instead of only to "answer or reply."

§ 586. *Denial involving non-essential circumstances.*—*Negative pregnant.*—A denial of matters contained in the adversary's pleading "as therein alleged," or rehearsing them as stated herein in such way as to include details not essential to the material part of the allegation, does not put in issue the essential part of the allegation, but avails as an admission of it.

Byrd vs. Nunn, *L. R.* 7 *Ch. D.*, 284; s. c., 23 *Moak's Eng.*, 577; aff'g *L. R.* 5 *Ch. D.*, 781; s. c., 22 *Moak's Eng.*, 457; 37 *L. T. Rep.*, *N. S.*, 90). (Action for specific performance of agreement to grant a lease. Plaintiff alleged that the defendant's predecessor in title made the agreement in question, by his lawfully authorized agent, with one H., the plaintiff's predecessor in title. Defendant denied this, by repeating the words of the statement of claim, and then alleged that H. was of unsound mind when the agreement was alleged to have

- been signed, and was incapable of authorizing, and did not, in fact, authorize any one as stated. *Held*, that defendant could only give evidence as to the state of the mind of H., and not on the question whether the agent was authorized or not, that being impliedly admitted.)
- Thorp vs. Holdsworth.** *L. R.* 3 *Ch. Div.*, 637. (Action for dissolution of partnership. Plaintiff set out the terms of an agreement for partnership; and defendant's pleading admitted that he had agreed to enter into partnership, and added: "The defendant denies that the terms of the agreement between himself and the plaintiffs were definitely agreed upon as alleged." *Held*, an evasive denial, and that the plaintiff was entitled by this admission on the pleadings to a decree for dissolution.)
- Tildesley vs. Harper.** *L. R.* 7 *Ch. D.*, 403; s. c., 38, *L. T. R. N. S.* 60. (Action to set aside a lease. Allegation that defendant bribed one of the plaintiffs, a trustee, to grant him a lease. Denial following the actual words of the allegation. *Held*, evasive.)
- [Rev'd in *L. R.* 10 *Ch. D.*, 393; s. c., 26 *Moak's Eng.*, 782, on the ground that it was error to refuse leave to amend.]
- s. p., Schuey vs. Schaeffer.** 130 *Pa. St.*, 16; s. c. as Appeal of Schuey (*Pa.*, October, 1889), 18 *Atl. Rep.*, 544, 546. [*Contra*, of an answer denying "each and every statement and averment, and every part of the same, in said amended complaint as therein stated or otherwise." *Kingsley vs. Gilman*, 12 *Minn.*, 515.]
- Dole vs. Burleigh.** 1 *Dak.*, 227. (Denial of, etc., in manner and form as therein set forth, bad.)
- Breckinridge vs. Am. C. Ins. Co.**, 87 *Mo.*, 62. (Action on policy: denial of "the destruction of said property as alleged," bad.)
- Stewart vs. Budd.** 7 *Mont.*, 573; s. c., 19 *Pacif. Rep.*, 221.
- Dimon vs. Dunn.** 15 *N. Y.*, 498; rev'g *Dimon vs. Bridges*, 8 *How. Pr. (N. Y.)*, 16. (Foreclosure. The complaint set forth the condition of the bond, and alleged that the mortgage was executed "with the same conditions as the said bond." The answer denied that the mortgage contained the condition, repeating it as stated in the complaint. *Held*, insufficient on demurrer. It was not a denial that the mortgage contained, by reference to the bond or otherwise, substantially the same condition. To raise that issue, the defendant should have denied the deeds, or set forth the condition of the mortgage *in hæc verba*, that the Court might see what it was.)
- Doll vs. Good.** 38 *Cal.*, 287. (Allegation that A and B conveyed to C for \$7,750. Denial that A and B or either

of them conveyed to C for \$7,750 or any other sum, *held*, an admission of conveying, and only a denial of all consideration.)

Baker vs. Bailey, 16 *Barb.* (N. Y.), 54. (Allegation of assault on a specified day and at a specified place, and consequent death on another specified day. Denial that on the day first named, at the place named or any other place, defendant made the assault, or that on or about the day last named death occurred,—*held*, an admission that defendant committed the assault, and defendant could not give evidence that death was from another cause.)

s. P., Schaetzel vs. Germantown, etc., Ins. Co., 22 *Wisc.*, 412.

Phoenix Ins. Co. vs. Trustees of Beechland Grange, 7 *Ky. L. J.*, 670. (Action on fire policy. Allegation that “all the facts,” connected with the title to the property were made known to the defendant. Denial that “all the facts” were made known to it, *held*, not a denial that any particular fact was made known.)

[For other cases see **Blankman vs. Vallejo**, 15 *Cal.*, 638; **King vs. Ray**, 11 *Paige* (N. Y.), 235; **Harris vs. Shontz**, 1 *Mon. T.*, 212; **Toombs vs. Hornbuckle**, *id.*, 286; **Caulfield vs. Sanders**, 17 *Cal.*, 569; **Higgins vs. Wortell**, 18 *id.*, 330; **Sheldon vs. Middleton**, 10 *Iowa*, 17.]

[*Contra.* In **Wall vs. Buffalo Water Works Co.**, 18 *N. Y.*, 119, rev'g 1 *Duer*, 585, it was *held* that a denial “that plaintiff, without any fault or want of care on his part, did fall therein,” not having been moved against as indefinite or uncertain, was a “good denial” of plaintiff's allegation of his having fallen into the ditch; and judgment was reversed for holding the contrary. Opinion by ROOSEVELT, J. DENIO, J., in a well-considered opinion dissented, and HARRIS, J., concurred with him. The opinion of DENIO, J., is more in accordance with later cases and with common practice, and agrees much better with decisions in other States.

See **Hincken vs. Mutual Benefit Life Ins. Co.**, 6 *Lans.* (N. Y.), 21, 24 (*aff'd* in 50 *N. Y.*, 657, without noticing this point), and cases cited under §

To the contrary, however, also is **Parker vs. Tillinghast**, 1 *N. Y. State Rep.*, 296, where, in an inferior court, a denial by a rehearsal of the allegations of the complaint in all its details, was held good, in an action for work, labor, and services.

To the same effect was **Elton vs. Markham**, 20 *Barb.*, 343, holding that an objection on this ground is a formal

one, and unless raised by motion before the trial, will be waived, and each allegation regarded as controverted. In *Pfaudler Process Fermentation Co. vs. McPherson*, 20 *State Rep.*, 473 ; s. c., 3 *N. Y. Supp.*, 609, it was held that to a complaint alleging that on or about a day specified, defendants entered into an agreement with plaintiff that, etc., stating it by legal effect, an answer denying that on or about the day specified, or at any other time, they entered into an agreement with, etc., stating it in the same terms as in the complaint, is not a mere negative pregnant and therefore an admission of the allegation ; but sufficiently manifests an intent to deny some substantial part if not all of the contract, and to put plaintiff to a motion to make more definite and certain, if he is embarrassed ; and if he does not move before trial, the defect may be cured by allowing amendment at the trial to make a distinct issue ; and plaintiff cannot object that he is surprised, or that such an amendment is improper as allowing a new defence to be interposed.

§ 587. *Negative pregnant*.—An answer which confines itself to denying, in the same words, an allegation of the complaint, and does not attempt to deny its substance and spirit, admits the substantial matter of the averment and only raises an immaterial issue.

James vs. McPhee, 9 *Colo.*, 486 ; s. c., 13 *Pacif. Rep.*, 535. (An answer which confines itself to denying, in the same words, the allegations of the complaint, and does not attempt to deny their substance or spirit—e.g., a denial that *all* a debtor's property was assigned to the plaintiff suing as an assignee ; or that defendant *requested* the plaintiff to deliver a specified number of bricks sued for—is bad as being evasive and tendering immaterial issues. Judgment for plaintiff on pleadings reversed, because another defence set up was sufficient.

Leffingwell vs. Griffing, 31 *Cal.*, 231. (Action to recover \$3000 as money had and received. Denial "that he received \$3000 in gold coin, parcel of the \$65,000, to and for the use of the plaintiff." Held (on appeal from judgment), bad (1) The complaint did not charge that the \$3000 sued for was parcel of \$65,000. The traverse, therefore, was pregnant with an admission that the \$3000 had been received as charged. (2) The

denial that the \$3000 was received in gold coin involved the admission that the \$3,000 was received in either one of the other two forms of lawful money.)

Castro vs. Wetmore, 16 *Cal.*, 379. (Denial of the making and delivery of the note on the day mentioned raised an immaterial issue as to time, and was not a denial of the substantial matter of the averment.)

Landers vs. Bolton, 26 *Cal.*, 393, 416. (Action to quiet title: denial that the premises were conveyed "to the defendant for the sum of \$7750, or for any other sum." *Held*, only a denial of a conveyance for a sum of money, and not of the material part of the allegation of the answer that the premises had been so conveyed.)

Harden vs. Atchison & N. R. R. Co., 4 *Neb.*, 521. (Allegation that "defendant carelessly, negligently, and wantonly ran its engine and cars over and upon plaintiff's mare," etc. Denial that the "defendant carelessly, negligently, and wantonly ran over said mare." *Held*, error to instruct the jury that this denial put the plaintiff upon proof of his case, of injury to his mare by the defendant's engines or cars; and failing to prove it, to give a verdict for the defendant. The denial of defendants was but a denial of negligence, and not a denial that the defendant occasioned the injury complained of. "A defendant must answer the charges directly without evasion, and not by way of negative pregnant." Citing 1 *Van Santvoord's Eq.*, 204; *Moak's Van Sant. Pl.*, 814; *Baker vs. Bailey*, 16 *Barb.*, 56; *Fish vs. Redington*, 31 *Cal.*, 194; *Robbins vs. Lincoln*, 12 *Wisc.*, 8.)

[*Contra*, *Wall vs. Buffalo Water Works Co.*, 18 *N. Y.*, 119, cited under last section.]

§ 588. *Evasive denial*—not covering the allegation.—

A denial which is not as broad as the allegation cannot be extended by implication to cover the whole, but the part not covered stands admitted. Denying part of an allegation, without more, is an admission of the residue.¹

But a denial which is express and sufficient as to the main part of the allegation, and necessarily implies the falsity of the residue, may be sufficient as to the whole.²

Anderson vs. Black, 70 *Cal.*, 226; s. c., 11 *Pac. Rep.*, 700. (Holding that to an allegation that defendants had done a specified wrongful act and threatened to continue to do it, a denial that they had done it does not raise any

issue as to the threatened continuance; and therefore that defendants could not complain that the judge made no finding on that question when the jury found a verdict against defendant on the legal issues.)

Norris vs. Glenn, 1 *Idaho*, 590. (Action for damages for building a dam across a stream passing through plaintiff's lands and flowing them. *Held*, not error to refuse to give instructions upon an assumption that an issue had been raised as to the existence of a watercourse through plaintiff's land. There was no such issue. The answer only denies building a dam across any watercourse running through plaintiff's land. It concedes there is such a watercourse. This evasive form of denial has long been held bad where the complaint is sworn to, both at common law and under the Code. Citing *Smith vs. Richmond*, 15 *Cal.*, 501; *Wallace vs. Bear R. W. & M. Co.*, 18 *Cal.*, 461.)

Beyre vs. Adams, 73 *Iowa*, 382.

Breckinridge vs. Am. C. Ins. Co., 87 *Mo.*, 62. (Action on policy: denial that plaintiff consented to alleged assignment, and that its agents had authority to consent, *held*, an admission of the agency and the existence of agents' written consent, and a denial only of their authority in the particular case.)

Under an allegation as to the place where the accident occurred, and the defective condition of which caused the injury, describing the place as "at the crossing belonging to such railroad,"—*held*, that an answer denying the defect but not denying the ownership admitted the ownership. *Spooner vs. Delaware, Lackawanna & Western Railroad Co.*, 115 *N. Y.*, 22, 31; s. c., 23 *N. Y. State Rep.*, 554. So held especially where evidence of subsequent reconstruction by defendant, which would have been competent as tending to show ownership, was excluded on defendant's objection.

Russell vs. Russell, 4 *Dana (Ky.)*, 40, 42. (Allegation that certain letters were received from defendant. Denial of writing, without denial of sending them, *held*, obviously evasive.)

Richardson vs. Smith, 29 *Cal.*, 529. (Allegation that "plaintiff was the owner and in possession of the property," is not put in issue by a denial that "plaintiff was the owner and entitled to the possession of the property.")

Churchill vs. Bennett, 8 *How. Pr. (N. Y.)*, 309. (Creditor's suit. Allegation that the assignees never had actual possession. Answer alleging that they took possession and had at all times had exclusive direction, control,

etc.; that the assets were *bona fide* surrendered into the possession of the assignees,—*held*, on motion as to injunction, an admission that the assignees never had *actual* possession, for the answer might be true, having reference to *legal* possession.)

- * *Robinson vs. Commercial Exchange Ins. Co.*, 1 *Abb. Pr. N. S. (N. Y.)*, 186. (Allegation that defendants sold plaintiffs' property for a certain sum, and that they "have had the use of, and interest on, said money since it was received as aforesaid by defendants for the plaintiffs' use." Denial that they sold plaintiffs' property, or received therefor any money whatever to plaintiffs' use, *held* sufficient. *MONELL, J.*, said: "The denial of the substantive cause of action is enough to controvert all the mere incidents to it.")

§ 589. *Addition of hypothetical or contingent avoidance*.—Under the New Procedure, a good denial is not vitiated by adding a contingent or hypothetical avoidance of the matter already denied.

A denial that defendant ever made or joined in making the note in question, adding that if his name appeared on it, either as maker or indorser, it is a forgery, is a specific denial of the allegation of the signature. It is not averring a legal conclusion. *Ludlow vs. Berry*, 62 *Wisc.*, 78; 22 *North West. Rep.*, 140.

For other authorities see §§ 533–549, *Allegations tendering issue*, and §§ 642–649, *Inconsistency*.

§ 590. *Conjunctive denial of conjunction*.—*Negative pregnant*.—To an allegation stating several facts conjunctively, a conjunctive denial only denies the conjunction, and is not a denial of the separate existence of either fact. Thus to an allegation that defendant took and detained, a denial that he took and detained avails as an admission that he took, or that he detained, according as may be most favorable to the case of the plaintiff, and only denies that defendant did both.¹

But if an allegation states conjunctively several facts

all of which are together essential to constitute a material allegation, a conjunctive denial is good.²

¹ Moser vs. Jenkins, 5 Oreg., 447.

Richardson vs. Smith, 29 Cal., 529. (Allegation that "defendant wrongfully took the property from the plaintiff's possession, and from thence to the time the action was commenced, wrongfully detained the same property from him." Denial "that defendant at any time wrongfully took and detained the property from the plaintiff." Held, that the allegation was admitted.)

Kay vs. Whittaker, 44 N. Y., 565. (Foreclosure. Allegation that the bond contained condition for payment of principal on default in interest, and that the mortgage contained the same condition. Denial that "the bond and mortgage" contained such a condition. Held, only a denial that both instruments contained it, and therefore an admission that the bond contained it, and as a mortgage is controlled by the bond it refers to, the denial was frivolous.)

Davis vs. Mapes, 2 Paige (N. Y.), 105, 108. (WALWORTH, Ch., says: "As a general rule, when the charge in the bill embraces several particulars, the answer should be in the disjunctive, denying each particular, or admitting some and denying the others, according to the fact." [Citing 1 Grant's Ch. R., 148; Hoffman Chy. (N. Y.), 263.]

Pullen vs. Wright, 34 Minn., 314; s. c., 26 North West. Rep., 394. (Defendants deny that they warranted and represented that said chest of tea was full and wholly occupied by tea, and that said baking power and molasses was good and merchantable. This admits the warranty. So of a denial that they warranted "all of said property." [Citing Pottgieser vs. Dorn, 16 Minn., 209.]

For other cases see Blood vs. Light, 31 Cal., 115. (Action to abate nuisance.)

² Miller vs. Tobin (Circ. Ct. D. Oreg., 1883), 18 Fed. Rep., 609, 614. (Where the sufficiency of an allegation that land was swamp-land and overflowed depended on the concurrence of both facts, a denial that it was swamp-land and overflowed was held good.)

1 Chitty Pl., 16 Am. Ed., *664. (Allegation in plea that ditches, ways, and passages were so filled with water that the defendant could not carry off his tithes: denial in replication that the ditches, ways, and passages were so,—held, though in the conjunctive, sufficient on

demurrer; because the plea was one entire matter of excuse, and the defendant relied on the whole and not on each particular part being impassable.)

§ 591. *Disjunctive denial*.—A conjunctive allegation is put in issue by a disjunctive denial.

For instance see *Hughes vs. Chicago, etc., Ry. Co.*, 45 *N. Y. Super. Ct. (J. & S.)*, 114, 126. (Here, to an allegation in a complaint that the net earnings of a railroad company were over a specified sum, and more than sufficient to pay a specified debt, an answer denying that the net income with or without regard to interest was over such sum, or that it was more than sufficient to pay such debt, was *held* proper in form.)

§ 592. *Surplusage in denial*.—A denial sufficient in itself is not vitiated by the addition to it of any matter not abridging or qualifying it, although not needed to support the denial.

Simmons vs. Sisson, 26 *N. Y.*, 264.

§ 593. *Refusal to admit*.—An express refusal to admit cannot avail as a denial,¹ even though coupled with an expressed reservation of the right to give counter-evidence.²

¹ *Townshend vs. Townshend*, 1 *Abb. N. C. (N. Y.)*, 81. (Holding that an answer which "neither admits nor denies" does not let in the objection that a deed relied on by plaintiff is void.)

[For other cases, see *Irish vs. Pheby* (*Nebr.*, 889), 44 *North West. Rep.*, 438; *Bomberger vs. Turner*, 13 *Ohio St.*, 263; *Tabb vs. Tabb*, 82 *Va.*, 48. *Contra*, *Knapp vs. Slocomb*, 75 *Mass.* (9 *Gray*), 73.]

² *Cheever vs. Wilson*, 9 *Wall. (U. S.)*, 108, 122; s. c., 19 *Law Ed.*, 604. (In an action based upon a decree, an allegation by defendant that he "does not admit the validity or regularity of said decree," or that "it is operative to affect his rights," but, on the contrary, "reserves to himself the right to impeach it, if occasion should offer and require him to do so," is too vague and indefinite to have any effect, and does not allow him to assail the

decree. SWAYNE, J., said: "If he desired to assail the decree, he should have stated clearly the grounds of objection upon which he proposed to rely. The averments should have been such that issue could be taken upon them" [citing *White vs. Hall*, 12 *Ves.* 324.])

§ 594. *Mere call for proof*.—A call for proof of an allegation, though coupled with an insufficient denial, does not serve as a denial, but is an admission of the allegation.

Ryan vs. Anglesea R. Co. (*N. J.*, 1888), 10 *Cent.*, 887; s. c., 12 *Atl.*, 539.

Bentley vs. Dorcas, 11 *Ohio St.*, 398, 408.

Building Association vs. Clark, 43 *Ohio St.*, 427; s. c., 1 *Western Rep.*, 337, 341; s. c., 2 *North East. Rep.*, 846, 850. (Here the plaintiff's reply, referring to an allegation in the answer, said: "That plaintiffs have no means of knowing, except from the allegations of said answer, anything in regard to the following allegation therein contained" [quoting it], and, "therefore, cannot admit or deny the same, but demand proof thereof." *Held*, no denial, but an admission, which dispensed with proof.)

§ 595. *Submission to court*.—An answer (other than in behalf of an infant or other person *non sui juris*) submitting to the court the question whether a document alleged and admitted to have been executed is valid, raises no issue, unless the facts bearing on the question of validity are stated.

Armstrong vs. Lear, 8 *Pet. (U. S.)*, 52. (Question of foreign law, as affecting validity of will.)

Watson vs. Hawkins, 60 *Mo.*, 550. (Question of jurisdiction of court by which a former judgment was rendered.)

§ 596. *Admission of some such a contract admits correctness*.—An express admission of an instrument like that alleged, even though coupled with a denial of all else,¹ or a denial that its terms are correctly and fully stated, is an admission of it as alleged,² and dispenses with proof.

- ' *Millville Manufacturing Co. vs. Salter*, 15 *Abb. N. C.*, 305 ; s. c., 1 *How. Pr., N.S.*, 495. (Admission of the acceptance of "a draft similar to the one set forth in the complaint," with a denial of all else and an allegation that the acceptance thereof was for the accommodation of the drawer and without consideration. *Held*, that the acceptance of the draft in suit was admitted, and it was error to dismiss the complaint at the trial for failure to prove the fact.)
- Moody vs. Andrews*, 39 *N. Y. Super. Ct. (J. & S.)*, 302 ([affirmed, it seems, in 64 *N. Y.*, 641, but without opinion]. An admission of making a note "like that" mentioned in the complaint, and a denial of everything else, admits the note alleged and dispenses with proof.)
- ' *Wallach vs. Commercial F. Ins. Co. of N. Y.*, 12 *Daly (N. Y.)*, 387. (Fire policy. The Court say that it is impossible from this form of denial to ascertain what is denied to be correct and what is alleged to be incomplete. The plaintiff was not bound to prove the policy, it not being denied.)

§ 597. *Denial of correctness of copy.*—A denial that the copy, set forth in or annexed to the complaint, of the instrument on which the action is brought, is a correct copy, without showing that it is incorrect in any particular material to the action, is an admission of the correctness of the copy so far as material.

- Denver & New Or. Constr. Co. vs. Stout*, 8 *Colo.*, 61 ; s. c., 5 *Pacif. Rep.*, 627. (Holding that it is not enough to add that "important parts of the instrument are omitted.")
- Roberts vs. Societa Anonima*, 53 *N. Y. Super. Ct. (J. & S.)*, 424, 428.
- Wallach vs. Commercial Fire Ins. Co.*, 12 *Daly (N. Y.)*, 387.
- Bentley vs. Dorcas*, 11 *Ohio St.*, 398, 408.
- s. p., *Knerr vs. Bradley*, 105 *Pa. St.*, 190. (Such denial in an affidavit of defence, coupled with statement of a material clause omitted, sufficient.)
- Contra*, *Haberkorn vs. Hill*, 2 *N. Y. Supp.*, 243., (where, at special term, such a denial was said to be a denial of the agreement.)

§ 598. *Craving leave to refer.*—A statement in pleading that the party asks to refer to the original of a docu-

ment set forth by his adversary's pleading, is not a denial of the contents, but an admission.

Murray vs. N. Y. Life Ins. Co., 9 *Abb. N. C.*, 309; s. c., 85 *N. Y.*, 236, 240; rev'g 19 *Hun*, 350; *Hughes vs. Chicago*, etc., *Ry. Co.*, 45 *N. Y. Super. Ct. (J. & S.)*, 114, 122; *Roberts vs. Societa Anonima*, 53 *id.*, 424; *Millville Manuf. Co. vs. Salter*, 15 *Abb. N. C.*, 305; s. c., 1 *How. Pr. N. S.*, 495; *Wallach vs. Commercial Fire Ins. Co.*, 12 *Daly*, 387.

In *Barnard vs. Wieland* (*Cham. Div.*, June, 1882), 30 *Weekly Rep.*, 947, defendant's statement of defence craved leave to refer to the deeds alleged in the statement of claim, and, save as by such deeds, when produced, should appear, not admitting that the same were to the purport or effect as mentioned in the statement of claim. *Held*, that the execution of the deeds was sufficiently admitted, and that on their production plaintiff was entitled to judgment. CHITTY, J., said: "The admission amounts to this: 'There were such deeds of the dates and made between the parties mentioned, but we are not sure what the deeds are.'"

§ 599. *Direct allegation to contrary*.—A denial which is in the form of a direct allegation to the contrary of that of the adversary is a good denial, although the word "denial" or its formal equivalent be not used.¹ Otherwise of the mere statement that the contrary of an allegation referred to is true.²

¹ *Perkins vs. Brock*, 80 *Cal.*, 320. (The Court say: "It is not essential that a traverse should be expressed in negative words. An averment in the answer of the contrary of what is alleged in the complaint has been held to be equivalent to a denial." Citing *Miller vs. Brigham*, 50 *Cal.*, 615; *McDonald vs. Davidson*, 30 *Cal.*, 174; *Thompson vs. Lynch*, 29 *Cal.*, 189. Affirmed.)

Burlington, etc., R. R. Co. vs. Young Bear, 17 *Nebr.*, 668; s. c., 24 *North West. Rep.*, 377. (To an allegation that the property is unlawfully detained by defendant, and that plaintiff is entitled to the immediate detention of the same, an allegation in the answer that the property was not unlawfully detained by the defendant, nor was plaintiff entitled to the immediate possession of the same, is sufficient.)

² *Story's Eq. Pl.*, 26.

Homire vs. Rodgers, 74 *Iowa*, 395. (Action for an excess of money paid on a contract made with the intestate of plaintiff by the defendant for herding cattle. Answer that the defendant was entitled under the contract to the amount he had collected. *Held*, error to instruct jury that the defendant must establish that he was entitled to all the money that he had collected. The plaintiff had alleged that he was entitled to a smaller amount. Defendant was not obliged to answer affirmatively as he did. A general denial would have been sufficient and made the issue. The burden was on the plaintiff to prove his allegation. That the answer was made as it was did not change the rule. Therefore reversed.)

Walker vs. Johnson, 2 *McLean* (*U. S. Cir. Ct.*), 92. (Allegation in plea that diligence was used: reply alleging negligence. But the Court say plaintiff should have negatived the allegation of diligence.) [See next section.]

§ 600. *Different version not a denial.*—Allegations giving a different version of the transaction from that alleged by plaintiff do not avail as a denial. There must be an express traverse of plaintiff's version; otherwise plaintiff's version stands admitted, notwithstanding the defendant's allegations inconsistent therewith.

McDonald vs. Salem Capital Flour Mills Co., 31 *Fed. Rep.*, 577, 579. (Hearing on plea.) *First Natl. Bk. vs. The Same*, *id.*, 580. (These cases hold that a plea which attempts to controvert a fact by simply alleging a fact contradictory thereof is not sufficient; the plea must go further, and directly negative or traverse the facts inconsistent with the fact alleged.)

West vs. Am. Exch. Bk., 44 *Barb. (N. Y.)*, 175, 179. (Action against bank as collecting agent. Allegation of employment and undertaking not denied, except by alleging that defendant was the agent of an intermediate bank, and paid the proceeds to that bank. *Held*, no denial. JAMES C. SMITH, J., said that what merely implies that the allegation is controverted, or justifies an inference that such is or will be claimed to be its effect, will not be construed as a denial.)

Followed in *Fleischmann vs. Stern*, 90 *N. Y.*, 110, 114; s. c., 15 *N. Y. Weekly Dig.*, 274; affg 24 *Hum*, 265; s. c., 61 *How. Pr.*, 124. (Usury.)

Wood *vs.* Whiting, 21 *Barb. (N. Y.)*, 190. (Action for money received as collecting agent.)

The rule was the same at Common Law. 1 *Chitt. on Pl.*, 16 *Am. ed.*, *561. *United States vs. Buford*, 3 *Pet.*, 12, 31. (Allegation in plea that the money paid was that of M., and paid as his private transaction. Replication that it was the money of the United States, and advanced by him as an officer to an officer.)

The ruling in *Gilbert vs. Cram*, 12 *How. Pr.*, 455, that an allegation that the credit on which goods were bought had not expired, was a specific denial of an allegation of indebtedness for the goods alleged to have been sold, is disapproved in *Gould on Pl.*, 316, *n. ix.* But a denial of the transaction alleged lets in evidence of a different version (see § —). And in *Landis vs. Morrissey*, 69 *Cal.*, 83; 10 *Pacif. Rep.*, 258, where the complaint alleged sale and defendant's promise to pay the price whenever requested, a denial was held to let in evidence of unexpired credit; and judgment was reversed for error in excluding it.

§ 601. *Giving different version of does not change burden of proof.*—Defendant, by alleging as if it were an affirmative defence matter which is only a traverse of the necessary allegations of the plaintiff, and therefore might be proved under a general denial, does not relieve plaintiff of the burden of proving those allegations if they are sufficiently denied.

Homire vs. Rodgers, 74 *Iowa*, 395; *s. c.*, 37 *North West.*, 972. (The complaint alleged in effect that the plaintiff's intestate took cattle to pasture and turned them into a pasture leased of the defendant, and that the owners of the cattle, relying on the statement of the defendant, had paid to him an amount in excess of what was due him for the use of pasture, and asked judgment for such excess. The defendant in his answer affirmatively pleaded that the money collected was no more than was due him under the contract with the plaintiff's intestate. *Held*, the whole question as to what compensation the defendant was to receive would have arisen under a general denial of the plaintiff's averment. The affirmative allegation in the answer did no more than raise that question; and the fact that the matter was pleaded in that form did not change the burden

of proof. Judgment reversed for error in charging the jury otherwise.)

- s. P., *Page vs. Merwin*, 54 *Conn.*, 426; s. c., 8 *Atlantic Rep.*, 675. (In an action for slander the Court committed no error, at the trial, in expunging from the record certain parts of the answer that contained nothing but detailed statements of the circumstances attending the transactions, in course of which the complaint alleged the slanderous words were uttered, where all the circumstances could be proved under the general denial. Judgment affirmed.)

Simmons vs. Sisson, 26 *N. Y.*, 264.

§ 602. *Different version coupled with denial.*—A different version coupled with an allegation that the facts were as thus stated and not otherwise, is a denial, not an admission, of plaintiff's version.¹

But if defendant alleges a different version, adding "and he *therefore* denies," etc., the denial is to be interpreted as only a conclusion of the pleader; and is insufficient, if the facts of which it is predicated are insufficient.²

¹ *Siter vs. Jewett*, 33 *Cal.*, 92, 96.

² *Baltimore & O. R. R. Co. vs. Walker*, 45 *Ohio St.*, 577; s. c., 19 *Cinn. Weekly L. Bul.*, 413. (*Dictum.*)

§ 603. *Denial upon information and belief.*—A denial expressed to be upon information and belief is good,¹ even in the pleading of partners denying an alleged partnership transaction,² or a pleading of a corporation denying an alleged corporate transaction.³

¹ After a period of much conflict in the cases in New York, this rule is now settled.

Bennett vs. Leeds Mfg. Co., 110 *N. Y.*, 150; s. c., 14 *N. Y. Civ. Pro. R.*, 443; 13 *Centr. Rep.*, 143; 16 *N. Y. State Rep.*, 841, 17 *North East. Rep.*, 669. This accords with the doctrine of the note in 14 *Abb. N. C.*, 319 And the ruling is so completely in accordance with justice and sound reason that it must prevail wherever the form of this statute does not clearly forbid.

Leyner vs. Fuller, 67 *Iowa*, 188; s. c., 25 *North West. Rep.*, 123. (Complaint to quiet title by impeaching a decree as a pretended decree because plaintiff had no notice of the proceedings; answer denying knowledge or information sufficient to form a belief as to whether he had notice, etc., other than is shown by the recitals in the decree [which recited due service, etc.], and on such knowledge defendants upon information and belief averred that he had notice. *Held*, a good denial of the want of notice; distinguishing *Manny vs. French*, 23 *Iowa*, 250, and *Clafin vs. Reese*, 54 *Iowa*, 544, s. c., 6 *N. W. Rep.*, 729, as cases where denial related to knowledge only, saying nothing of information.)

Mair vs. Forbes (*Cal.*), 21 *Pac.*, 552. (Not officially reported.)

Stacy vs. Bennett, 59 *Wisc.*, 234; s. c., 18 *North West. Rep.*, 26.

Miller vs. District of Columbia, 5 *Mackey* (*D. C.*), 291; s. c., 14 *Wash. L. Rep.*, 746. (Conceding this to be the rule, but holding that such a denial, being hearsay, is not proof under the equity practice.)

So a statement "upon information and belief that no allegation of the complaint is true," is a good denial. *Metraz vs. Pearsall*, 5 *Abb. N. C.*, 90.

² *Wood vs. Radure*, 39 *Hun* (*N. Y.*), 144. (The Court say: The defendant answering may have positive knowledge that he did not sign the note himself. He may have no knowledge as to whether or not it was signed by the other member of the firm. He may, however, have been informed by the other member of the firm that he had never signed or delivered such a note; having confidence in the statements of his copartner, he has information which he believes, to the effect that the note was never signed by either of the firm. He could not truthfully say that he had no knowledge or information sufficient to form a belief, because he has been informed and believes that his copartner never signed the note. Can it be that it was intended to deprive him of the right to put in issue and raise the question as to whether or not the note was a forgery? We think not; to our mind section 524 makes clear his right to deny upon information and belief, when he has such information and belief and has not positive knowledge.")

Brayley vs. Hedges, 52 *Iowa*, 623; s. c., 3 *North West. Rep.*, 652. (So held of an answer by partners; and even under statute requiring denial under oath in order to let in evidence controverting execution of contract.)

But one defendant cannot swear to the want of sufficient

information to form a belief on the part of a co-defendant. *Kinkaid vs. Kipp*, 1 *Duer* (N. Y.), 692; *Richards vs. Frechsel*, 14 *Abb. N. C.*, 316 n.; s. c., 5 *Civ. Pro. R.*, 430. (So holding against motion for judgment on answer as sham and frivolous.)

The fact that a denial in a pleading verified by the party, is expressed to be on information and belief, is sufficient reason (in case of doubt) for construing it as admitting allegations relating to personal acts of the party.

^a Ruling in practice not reported.

As to exception in case of matters presumably without the party's knowledge, see § .

§ 604. *State court practice in Federal court.*—To plead to the jurisdiction in a court of the United States, a denial of knowledge or information sufficient to form a belief as to the jurisdictional allegation,—for instance citizenship,—in the complaint, is not enough, even though such a denial is good in a State court. The plea must be “certain to a certain intent” in every particular.

Cuthbert vs. Galloway, 35 *Fed. Rep.*, 466. [*Compare* § 509.]

§ 605. *Denial of knowledge or information sufficient, etc.*—An allegation that the defendant has “no knowledge or information sufficient to form a belief as to the truth of” a specified allegation, is a good specific denial.¹ And an allegation that he has “no knowledge or information sufficient to form a belief as to any of the allegations in said complaint contained,” is a good general denial.² For this purpose knowledge and information sufficient etc., must be distinctly negated. Neither a denial of knowledge sufficient, etc.,³ nor a denial of information sufficient, etc.,⁴ will alone raise an issue.

¹ *Jackson Sharp Co. vs. Holland*, 14 *Fla.*, 384.

Carr vs. Bosworth, 68 *Iowa*, 669; s. c., 27 *North West. Rep.*, 913. (Action to quiet title.)

Maxim vs. Wedge, 69 *Wisc.*, 547; s. c., 35 *North West. Rep.*, 11. (Trespass to real property.)

Dickinson vs. Gray (*Ky.*, 1888), 9 *South West. Rep.*, 281. (Holding that under *Ky. Code Civ. Proc.*, § 113—which allows, as to facts not presumptively within the party's knowledge, a denial that he "has sufficient information or knowledge to form a belief" concerning them—a plea that he has "no knowledge or information" is sufficient.)

* Grocers' Bank vs. O'Rorke, 6 *Hun (N. Y.)*, 18.
s. p., Meehan vs. Harlem Savings Bank, 5 *id.*, 439.
[In some States incorporation cannot be thus denied.]

* Mead vs. Day, 54 *Miss.*, 58.

Heye vs. Bolles, 33 *How. Pr. (N. Y.)*, 266.

Sayre vs. Cushing, 7 *Abb. Pr.*, 371. (Even saying defendant does not know of his information or otherwise, is not a denial.)

First Nat'l Bank vs. Clark, 22 *N. Y. Weekly Dig.*, 569.

Bradford vs. Geis, 4 *Wash. C. Ct.*, 513.

Terrill vs. Jennings, 1 *Metc. (Ky.)*, 450. ("That he knows nothing on the subject of his own knowledge" does not raise an issue.)

First Nat'l Bank of Richfield Springs vs. Clarke, 22 *N. Y. Weekly Dig.*, 569.

Contra, in Ohio, McKenzie vs. Washington, etc., Ins. Co., 2 *Disney (Ohio)*, 223.

* Claffin vs. Reese, 54 *Iowa*, 544. (Foreclosure. *Held*, not error to refuse defendant's request for a jury. There was no allegation of the answer sufficient to raise an issue. He states that he had no *information* sufficient to form a belief, etc. He should have denied that he possessed any *knowledge* or information sufficient to form a belief. Citing *Rev. Code*, § 2655; *Manny vs. French*, 23 *Iowa*, 250. Affirmed.)

Elton vs. Markham, 20 *Barb. (N. Y.)*, 343.

Lloyd vs. Burns, 38 *N. Y. Super. Ct. (J. & S.)*, 423; [aff'd, it seems, in 62 *N. Y.*, 651, without opinion.]

Greer vs. City of Covington, 83 *Ky.*, 410. (Suit to collect taxes. *Held*, not error to strike defendant's answer that he "has no information sufficient to found a belief upon, that any of the ordinances mentioned in plaintiff's amended petition were ever published *as required by law*." This was but a statement of the party's want of information of the law.)

Hastings vs. Gwynn, 12 *Wisc.*, 750.

Contra, in Ohio, Treadwell vs. Commissioners, 11 *Ohio St.*, 183.

§ 606. — *except from specified sources.*—A denial of knowledge or information sufficient to form a belief as to an alleged fact, except from specified documents, without stating what that information is or what part of the allegation is intended to be excepted, is an admission of the whole allegation.

Rienze vs. Barker (*N. J. Eq.*, 1886), 4 *Atl. Rep.*, 309 ; s. c., 3 *Cent. Rep.*, 375.

Cuyler vs. Bogert, 3 *Paige* (*N. Y.*), 186, 188.

§ 607. — *and therefore denies the same.*—When a denial of knowledge or information sufficient to form a belief is properly made, it is not necessary to add “and therefore denies the same.¹” When it is not proper, or is defectively stated, it is not aided by such addition.²

¹ *Meehan vs. Harlem Savgs. Bk.*, 5 *Hun* (*N. Y.*), 439.

Sackett vs. Havens, 7 *Abb. Pr.*, 371, note.

Flood vs. Reynolds, 13 *How. Pr.* (*N. Y.*), 112. (So held denying motion for judgment for frivolousness.)

² *The Holladay Case* (*C. Ct. Oreg.*), 27 *Fed. Rep.*, 830, 841. s. p., *Claffin vs. Reese*, 54 *Iowa*, 544 ; s. c., 6 *North West. Rep.*, 729.

San Francisco Gas Co. vs. San Francisco, 9 *Cal.*, 453. (Here the decision seems to rest in part on the objection that the denial was general and not specific.)

§ 608. *Denial in alternative in respect to knowledge, etc.*—A denial expressed in the alternative as “either upon his own knowledge, or as having no knowledge or information sufficient,” etc., is an admission, especially when plaintiff was entitled to a verified answer.

Sheldon vs. Sabin, 12 *Daly* (*N. Y.*), 84 ; s. c., 4 *Civ. Pro. R.*, 4. (Holding it error to deny motion for judgment for want of an issue. The law requires a denial that will probe the conscience.)

§ 609. *Matters presumptively within the pleader's knowledge.*—Unless the statute of the State requires a different rule,¹ it is the better opinion that even where the allegation relates to matters presumptively within the party's knowledge, a denial upon information and belief, and a denial of knowledge or information sufficient to form a belief are each sufficient to raise an issue if not objected to before trial.²

¹ In Colorado the statute is qualified. *Civ. Code*, § 56; *Sess. L.* 1887. So in South Carolina. *Hall vs. Woodward*, 9 *South East. Rep.*, 684.

² S. P., *Leach vs. Boynton*, 3 *Abb. Pr. N. Y.*, 1.

The reason is that the statute in its usual form allows such a denial without exception, and the fact that the matters are presumptively within the party's knowledge does not make the denial any less explicit, but throws doubt on its truth or good faith; and that the remedy to probe the party's conscience is by motion, when affidavits can be used.

To the same effect as the rule in the text are *Smalley vs. Isaacson*, 40 *Minn.*, 450; s. c., 42 *North West. Rep.*, 352, reversing judgment for error in this respect.

Richards vs. Frechsel, 14 *Abb. N. C. (N. Y.)*, 316, n.; s. c., 5 *Civ. Pro R.*, 430.

Slater vs. Maxwell, 6 *Wall. (U. S.)*, 268; s. c., 18 *Law. Ed.*, 796. (Objection to evasive denial waived by replying; but in Equity the evasiveness nevertheless enables plaintiff to prevail without the degree of evidence required to overcome a positive denial.)

[*Contra*, *Mead vs. Day*, 54 *Miss.*, 58 (reversing because the denial of knowledge was an admission); *Douglass vs. Cline*, 12 *Bush (Ky.)*, 608. It was held an admission in *Wing vs. Dugan*, 8 *Bush*, 583, before the change in the Ky. statute.]

In *Morris vs. Parker*, 3 *Johns. Ch. (N. Y.)*, 297, exceptions to answer in chancery were overruled; but in *Sloan vs. Little*, 3 *Paige (N. Y.)*, 103, that case was distinguished as one where the matters were not presumptively within defendant's knowledge; and where they were, exceptions were sustained.

For the rule in Equity compare *Brooks vs. Byam*, 1 *Story (U. S. C. Ct.)*, 296, with *Brown vs. Pierce*, 7 *Wall. (U. S.)*, 205, 211.

In *Curtis vs. Richards*, 9 *Cal.*, 38; and in *Fallon vs. Du-*

rant, 60 *How. Pr. (N. Y.)*, 178, such a denial of such matters was held demurrable.

Warner vs. U. S. Land, etc., Co., 53 *Hun (N. Y.)*, 312; s. c., 6 *N. Y. Supp.*, 411. (Concedes that a corporation is presumed to know acts done by itself; but allegations that it is a foreign corporation, and the act was done at a remote agency, repels the presumption.)

§ 610. *Jurisdiction.—General denial of citizenship.*—At Common Law,¹ and in Equity,² an objection to the jurisdiction of a Federal court, founded on citizenship, if the citizenship giving jurisdiction appears by plaintiff's pleadings, must be pleaded by defendant in abatement; it cannot be first raised under the general issue at Common Law,³ nor under an answer in Equity.⁴

But under the statute requiring the Court to dismiss an action colorably brought, the Court may raise the objection.

¹ *Sheppard vs. Graves*, 14 *How. (U. S.)*, 505.

² See note 4, below.

³ *D'Wolf vs. Rabaud*, 1 *Pet. (U. S.)*, 476, 498; *De Sobry vs. Nicholson*, 3 *Wall. (U. S.)*, 420; *Sims vs. Hundley*, 6 *How. (U. S.)*, 1; *Jones vs. League*, 18 *id.*, 76; *Boyreau vs. Campbell*, *McAll.*, 119; *aff'd* on other grounds, 21 *How. (U. S.)*, 223; *Sheppard vs. Graves*, 14 *id.*, 505.

⁴ *Livingston vs. Story*, 11 *Pet. (U. S.)*, 351.

Dodge vs. Perkins, 4 *Mas.*, 435. (The Court say: "A general answer admits that the plaintiff is rightfully in Court, and assumes that the Court have jurisdiction over the parties to hear and dispose of it according to the principles of a court of equity. . . . Before the Court can proceed to entertain any question upon the merits, it must know that it possesses the proper jurisdiction over the parties.")

Wickliffe vs. Owings, 17 *How. (U. S.)*, 47. (Issue cannot be taken upon averments as to the citizenship in a bill in chancery by denial in the answer. By the 39th rule in equity practice in the United States courts "matters of abatement, objections to the character of parties, and to matters of form" are excluded from the answer, and its operation confined to matters in bar or to the merits of the bill.)

§ 611—*Denial of Citizenship; under New Procedure.*—In an action of a common-law nature in a Federal court,—although in a State where the New Procedure has dispensed with pleading in abatement anything which is merely a denial of an allegation in the complaint,—a general denial of all the allegations of the complaint is held not enough to put in issue a jurisdictional allegation of citizenship.

Draper vs. Springport, 15 *Fed. Rep.*, 328, (but holding a specific denial sufficient.)

Imperial Refining Co. v. Wyman, 38 *Id.* 574.

(An objection to jurisdiction turning on the lack of diverse citizenship is not available in the United States courts under a general denial, even though such evidence would be competent under a general denial in a State court; for the limited jurisdiction of the United States courts is such that it is necessary there should be a distinct issue upon such a question, and therefore the State practice ought not to apply.)

But the Court has power on its own motion, under the act of 1875, to direct an issue to be made to test the question of jurisdiction, and for that purpose the defendant should be allowed to plead in abatement. *Ib.*

To avoid the abortion that must result from withdrawing the pleas to the merits and discarding all proofs that pertain to them, the Court may direct the jury to find a special verdict as to the citizenship of the parties. *Ib.*

Where the incorporation of the plaintiff in a particular State is relied on for the purpose of showing citizenship in order to give jurisdiction, and it is shown to be a limited partnership only, on a plea in abatement the Court may permit the plaintiff to amend its declaration by suing in the names of the persons who constitute the organization. *Ib.*

§ 612. — *form of denial of citizenship.*—If plaintiff's pleading alleges citizenship, an answer merely alleging that one of the parties is a citizen of a specified State dif-

ferent from that mentioned by plaintiff's allegation, without denying plaintiff's allegation, is bad.¹

A denial that all the defendants are citizens of a specified State, without alleging which are citizens of another, is bad.²

¹ Brooks *vs.* Bailey, 20 *Blatchf.* (*U. S.*), 85.

² Hinckley *vs.* Byrne, *Deady*, 224. (An allegation in a plea in abatement that all the defendants in an action are not citizens of a certain State is bad on demurrer for uncertainty. The plea should state which of the defendants are not citizens.)

§ 613 — *time of citizenship*.—A plea to the jurisdiction of the United States Circuit Court on the ground of citizenship must show that the parties were citizens of the same State at the time the action was brought, and not merely at the time of the plea.

Mollan *vs.* Torrance, 9 *Wheat.* (*U. S.*), 537; 6 *Law ed.*, 154. (Error to overrule demurrer to the plea.)

[Such precision is not required from plaintiff in alleging citizenship. See § 386, DEMURRER TO COMPLAINT.]

§ 614.—*Burden of proof as to jurisdiction*.—At Common Law the burden of proof is on a defendant who pleads in abatement that the Court has no jurisdiction, although the jurisdictional fact appear on plaintiff's pleading.

Under the New Procedure, the better opinion is that if the fact is necessarily alleged by plaintiff, plaintiff has the burden of proof if it be put in issue.

Gilmer *vs.* Grand Rapids (*U. S. Cir. Ct. Mich.*), 16 *Fed. Rep.*, 708.

8. ADMISSIONS, AND SHIFTING THE BURDEN OF PROOF BY UNVERIFIED DENIAL.

[What is here said under this head will be more useful to the reader if he observes that, on account of the great diversity in the phraseology of the statutes and the practice under them, this collection of provisions and cases forms an exhibit of comparative legislation and jurisprudence, which readily suggests the considerations of policy and justice to govern in doubtful questions under any statute. And in applying the general principles here stated, the practitioner should not fail to consider the terms of the particular statute under which he is proceeding.*]

The rules as to demurrer for failure to comply are under DEMURRER, §§ 234-254. Those which relate rather to the production of evidence under the issue, than to defining what the issue is, are under RECEPTION OF EVIDENCE. Some statutes requiring a sworn answer or an express denial to put in issue an allegation of incorporation, or to exclude notary's certificate of service of notice, etc., since they are only applicable in particular classes of actions and not as general rules of pleading, are not specially treated here.]

- | | |
|------------------------------------------------------------|------------------------------------------------|
| § 615. Nature of the statutes requiring sworn denials. | 626. — authority of agent. |
| 616. Necessary allegation to call for sworn denial. | 627. — authority of corporate officers. |
| 617. Execution, delivery. | 628. Defect of parties. Question of ownership. |
| 618. Evasive or loose denial. | 629. Instrument executed by several. |
| 619. Affidavit or pleading. | 630. Not a partner. |
| 620. Who may verify. | 631. Instruments executed by third person. |
| 621. Information and belief. | 632. Revocation of authority. |
| 622. Translation. | 633. Lost instrument. |
| 623. Signature by mark. | 634. Plaintiff not the real party in interest. |
| 624. — abbreviation in name, misnomer, and change of name. | 635. Other issues. |
| 625. — execution in firm name. | 636. Amending. |

* In Equity, in the Federal courts, a plea must be sworn and filed. Rule 31. *Filer vs. Levy*, 17 *Fed. Rep.*, 609.

In New York, an answer not involving the merits, must be verified (*N. Y. Code Civ. Pro.*, § 513), and this applies in actions in the Federal court (other than in equity, etc.); but according to the State court practice, lack of verification is waived unless the pleading is at once returned; or if it contain other defence, notice given of the defect and that the defence not involving the merits will be disregarded.

§ 615. *Nature of the statutes requiring sworn denials of written instruments and particular facts, etc.*—In some of the States the object of these regulations is simply to put, upon the party denying without verification, the burden of proof to disprove the instrument.

In others the object is to preclude all contention on the question at the trial, by making non-compliance with the statute equivalent to a conclusive admission of the instrument.

The statute or rule of each State is construed and applied in view of the object thus intended.

In the following list of States the names of those where the failure to deny under oath is generally an absolute admission of the instrument, are in italics.

The statutes of several other States merely require pleadings generally, or denials generally, to be verified; but these are not noted here.

Alabama,
Arizona,
Arkansas,
California,
Connecticut (notice only
required),
Delaware,
Florida,
Georgia,
Idaho,
Illinois,
Indiana,
Iowa,
Kansas,
Kentucky,
Louisiana (special veri-
fication not required,
but express admis-
sion or denial),

Michigan,
Mississippi,
Missouri,
Montana,
Nevada,
New Hampshire,
New Mexico,
Pennsylvania,
Tennessee,
Texas,
Utah,

Virginia { (unverified plea of
non est factum not
receivable. As to
signatures, unveri-
West Va. { fied, denial shifts
burden of proof),
Wisconsin.

Maryland,

Massachusetts (special verification not required, but special denial and demand for proof),

Alabama—Code of 1886, § 2676. "All pleas in abatement, unless it be of matter of record, pleas which deny the execution by the defendant, his agent, attorney, or partner, of any instrument in writing, the foundation of the

suit, or the assignment of the same, or which set forth any instrument in writing whether under seal or not, which is alleged to be lost or destroyed, and pleas since last continuance, must be verified by affidavit."

Arizona—Revised Statute of 1887, § 735. "Any answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit: . . . 6. A denial of partnership as alleged in the complaint, whether the same be on the part of the plaintiff or defendant. . . . 8. A denial of the execution by himself or by his authority of any instrument in writing upon which any pleading is founded, in whole or in part, and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed. Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit will be sufficient if it state that the affiant has reason to believe, and does believe, that such instrument was not executed by the decedent or by his authority. 9. A plea denying the genuineness of the indorsement or assignment of any written instrument. 10. That a written instrument upon which a pleading is founded is without consideration, or that the consideration of the same has failed in whole or in part."

Arkansas—Mansfield's Digest, § 5055 (Civil Code, § 135). "Every pleading must be subscribed by the party or his attorney, and the complaint, answer, and reply must each be verified by the affidavit of the party to the effect that he believes the statements thereof to be true; such verification shall not make other or greater proof necessary on the side of the adverse party."

Mansfield's Digest, § 2872 (Civil Code, § 578-580). "Where a writing purporting to have been executed by one of the parties is referred to in and filed with a pleading, it may be read as genuine against such party, unless he denies its genuineness by affidavit before the trial is begun."

California—Code Civ. Pro., § 447. "When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified."

§ 448. "When the defence to an action is founded on a written instrument, and a copy thereof is contained in the answer or is annexed thereto, the genuineness and due execution of such instrument are deemed ad-

mitted, unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant."

§ 449. "But the execution of the instrument mentioned in the two preceding sections is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same is, upon demand, refused an inspection of the original. Such demand must be in writing, served by copy upon the adverse party or his attorney, and filed with the papers in the case."

Colorado—Code Civ. Pro., § 62. "... When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument is deemed admitted, unless the answer denying the same be verified."

Connecticut—Practice Act (1879), § 25. § 3. "... If the defendant intends to controvert the execution or delivery of any written instrument or recognizance sued upon, he shall deny the same in answer specifically."

Delaware—Rev. Stat. 1874, p. 647, chap. 106, § 5. "In any action brought upon any deed, bond, bill, note, or other instrument of writing, a copy of which shall have been filed with the declaration, the defendant, not being an executor or administrator, shall not, on the trial, be allowed to deny his signature or that of any other party to the instrument, and the execution of such instrument shall be taken to be admitted, unless the defendant shall have filed an affidavit denying the signature, at the time of filing his plea, or within such further time as the Court shall, on motion, allow."

Florida—McClellan's Dig. (1881), p. 832, chap. 162, § 85. "It shall not be necessary for any person who sues upon any bond, note, covenant, deed, bill of exchange or other writing, whereby money is promised or secured to be paid, to prove the execution of such bond, note, covenant, deed, bill of exchange, or other writing, unless the same shall be denied by the defendant under oath."

§ 86. "... Nor shall it be necessary for the assignee or indorsee of any instrument assignable by law to set forth in the declaration the consideration upon which such assignment or indorsement was made, nor to prove such consideration, unless the same shall be impeached by the defendant under oath."

§ 88. "All promissory notes and other instruments of writing not under seal shall have the same force

and effect as bonds and instruments under seal; and it shall not be necessary for the plaintiff to prove the execution of any bond, note, or any other instrument of writing, purporting to have been signed by the defendant, nor the consideration for which the same was given, unless the same shall be denied by plea put in and filed as aforesaid: Provided, that nothing in this section shall prevent an executor or administrator from denying the execution aforesaid, or from pleading a want or failure of consideration, if he shall give in writing reasonable notice of such intention to the plaintiff, his agent or attorney."

§ 89. "In all actions upon promissory notes and other instruments of writing wherein a total failure of consideration may be now pleaded, partial failure of consideration may be pleaded in such manner as is now provided for filing such pleas of total failure of consideration: provided, that the grounds of defence shall be fully pleaded."

Georgia—Const. of 1877, Art. 6, § 4, par. 7. "The Court shall render judgment without the verdict of a jury, in all civil cases founded on unconditional contracts in writing, where an issuable defence is not filed under oath or affirmation."

[What is an issuable plea. See *Lanning vs. Lockett*, 4 *Woods*, 455; s. c., 11 *Fed. Rep.*, 814, aff'g 10 *id.*, 451.]

Code (1882), § 2851. "*Non est factum*. A party may deny the original execution of the contract sought to be enforced, or its existence in the shape then subsisting. In either event, if the contract be in writing, and so declared upon, the denial must be on oath and filed at the first term after the service is perfected."

§ 2855. "Indorsement, etc., not to be proved. An indorsement or assignment of any bill, bond or note, when the same is sued on by the indorsee, need not be proved unless denied on oath."

Idaho—Rev. Stat. (1887), § 4200. "When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified."

§ 4201. "When the defence to an action is founded on written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an

affidavit denying the same, and serve a copy thereof on the defendant."

§ 4202. "But the execution of the instruments mentioned in the two preceding sections is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same is, upon demand, refused an inspection of the original. Such demand must be in writing, served by copy, upon the adverse party or his attorney, and filed with the papers in the case."

Illinois—*Rev. Stat.*, chap. 110, par. 34. (*Cothran's Ann. ed.*, p. 1098); 2 *Starr & C. Ann. Stat.*, p. 1798. § 34. "No person shall be permitted to deny, on trial, the execution or assignment of any instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be pleaded or set up by way of defence or set-off, or is admissible under the pleadings when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit, and if plaintiff, shall file his affidavit denying the execution or assignment of such instrument: provided, if the party making such denial be not the party alleged to have executed or assigned such instrument, the denial may be made on the information and belief of such party."

[§ 35. Dispenses with proof of partnership and giving names of joint payees, etc., in certain cases.]

§ 36. "In actions upon contracts, express or implied, against two or more defendants, as partners or joint obligors or payors, whether so alleged or not, proof of the joint liability or partnership of the defendants, or their christian or surnames, shall not, in the first instance, be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by pleading in abatement, or unless the defendant shall file a plea in bar denying the partnership or joint liability or the execution of the instrument sued upon, verified by affidavit."

Under the above, § 36, which requires that if joint liability is denied under oath, proof of such joint liability must be made by plaintiff, an instrument which on its face apparently imports a joint liability is admissible, and it is for defendant to adduce extrinsic evidence under his denial. *Davis vs. Smith*, 29 *Ill. App.*, 313.

[See also *Forsyth vs. Doolittle*, 120 *U. S.*, 73, as to effect of omitting to deny.]

[Application to partnership. *Huntington vs. Chambers*, 15 *Ill. App.*, 426.]

Indiana—*Rev. Stat.*, chap. 2, § 364. "Where a pleading is founded on a written instrument, or such instrument is therein referred to, or when an assignment in writing of such instrument is specially alleged in a pleading, such instrument or assignment may be read in evidence on the trial of the cause without proving its execution, unless its execution be denied by pleading under oath, or by an affidavit filed with the pleading denying the execution. And when a written instrument or assignment is so pleaded or referred to, proof of the names of the makers, assignors, obligors, assignees, payees, or obligees, shall not be necessary unless the same shall be denied by a pleading under oath, or by an affidavit filed as aforesaid. The oath, in case that the time of assignment is questioned, shall be that the party has reason to believe, and does believe, that the assignment was not made before the suit was commenced; but executors, administrators, or guardians need not deny the execution of an instrument, or the assignment thereof, under oath, but the same must be proved as if it were so desired. The party shall, in all cases, be entitled to an inspection of the instrument in writing, before pleading thereto."

Iowa—*Code*, § 2669; *McClain's Ann. Code*, 3875. "Every pleading must be subscribed by the party or his attorney, and when any pleading in a case shall be verified by affidavit, all subsequent pleadings except demurrers shall be verified also; and in all cases of verification of a pleading the affidavit shall be to the effect that the affiant believes the statements thereof to be true."

§ 2730. *McClain's Ann. Code*, 3937. "When a written instrument is referred to in a pleading, and the same or a copy thereof is incorporated in or attached to such pleading, the signature thereto, and to any indorsement thereon, shall be deemed genuine and admitted, unless the person whose signature the same purports to be shall, in a pleading or writing filed within the time allowed for pleading, deny the genuineness of such signature under oath. If such instrument be not negotiable, and purport to be executed by a person not a party to the proceeding, the signature thereto shall not be deemed genuine or admitted if a party to the proceeding, in the manner and within the time before mentioned, state under oath that he has no knowledge or information sufficient to enable him to form a belief as to the genuineness of such signature. The person whose signature purports to be signed to such

instrument shall, on demand, be entitled to an inspection thereof."

Kansas—*Gen. Stats.* (1889), ¶ 4191, Civil Procedure, § 108, "In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney."

§ 109. "The verification mentioned in the last section shall not be required to the answer of a guardian defending for an infant or person of unsound mind, or a person imprisoned."

§ 111. "The affidavit shall be sufficient if it state that the affiant believes the facts stated in the pleading to be true."

Kentucky Civ. Code, § 116, requires every written pleading to be verified, by an affidavit to the effect that affiant believes the statements to be true, with certain exceptions, among which are:

Subd. 3. "A pleading which states a cause of action that is founded on a written contract, or upon a written indorsement or assignment thereof, if it be filed with the pleading."

Subd. 4. "A pleading which states a defence that is founded on a writing executed by the adverse party, and filed with the pleading."

Louisiana—Code of Pract., Art. 324. "When the demand is founded on an allegation, or an act under private signature, which is alleged to have been signed by the defendant, such defendant shall be bound in his answer to acknowledge expressly or to deny his signature."

Art. 325. "If the defendant deny his signature in his answer, or contend that the same has been counterfeited, the plaintiff must prove the genuineness of such signature, either by witnesses who have seen the defendant sign the act, or who declare that they know it to be his signature, because they have frequently seen him write and sign his name."

Art. 326. "The defendant, whose signature shall have been proved after his having denied the same, shall be barred from every other defence, and judgment shall be given against him without further proceedings."

Maryland—Pub. Gen. Laws (1888), Vol. II., p. 1094, Art. 75, § 11. "No plea of *non est factum* shall be received in any action, unless the party for whom such plea be

tendered verify the same by affidavit, or unless the defendant being heir, executor, or administrator of the person alleged to have made the deed, obtain leave from the Court upon showing just cause to put in such plea." p. 1114, Art. 75, § 23, subd. 108. "Whenever the partnership of any parties, or the incorporation of any alleged corporation, or the execution of any written instrument filed in the case, is alleged in the pleadings in any action or matter at law, the same shall be taken as admitted for the purpose of said action or matter, unless the same shall be denied by the next succeeding pleading of the opposite party or parties."

[For previous statutes see *Thorne vs. Fox*, 8 *Atl. Rep.*, 667.]

Massachusetts—*Pub. Stat.* (1882), p. 967, chap. 167, § 21.

"Signatures to written instruments declared on or set forth as a cause of action, or as a ground of defence or set-off, shall be taken as admitted, unless the party sought to be charged thereby files in court, within the time allowed for an answer, a special denial of the genuineness thereof, and a demand that they shall be proved at the trial.

Michigan—*Circ. Ct. Rule* 79 requires a sworn denial of execution by defendant, of an instrument on which he is sued, or it will be admitted.

For the statute applicable to justices' courts, see *How. St.*, § 6928.

Mississippi—*Rev. Code*, p. 455, chap. 58, § 1633. "In suits founded on any written instrument set forth in the pleading, it shall not be necessary to prove the signature or execution thereof, unless the same be denied by a special plea, verified by the oath of the party pleading the same; and in no case shall it be necessary to prove any written signature, the execution of any instrument, or any identity or names of persons, or description of character, or the persons composing any firm or partnership, which may be set forth in the pleadings, unless the same be denied by special plea, verified by oath, as aforesaid.

And the like rule shall prevail as far as may be applicable, in all cases where any writing is pleaded, or set up by the defendant, or any signature, identity, or names of persons, description of character, or partnership, set forth in his pleading."

Missouri—1 *Rev. Stat.* (1889), p. 566, § 2186. "When any petition or other pleading shall be founded upon any instrument in writing charged to have been executed by the other party, and not alleged therein to be lost or destroyed, the execution of such instrument shall be

adjudged confessed, unless the party charged to have executed the same deny the execution thereof, by answer or replication, verified by affidavit. . . ."

§ 2187. "The preceding section shall not be construed to authorize any instrument of writing to be received in evidence without proof of its execution, in any suit against an executor or administrator, or any other person representing the person charged to have executed such instrument, nor any county, city, or town, sued upon any instrument alleged to have been executed by such county, city or town, or any corporate authorities."

[This provision, introduced in 1868, changed the former statute, which only shifted the burden of proof. *McGill vs. Wallace* (Mo., 1886), 4 *Western Rep.*, 912; *Smith Middlings P. Co. vs. Rembaugh*, 21 *Mo. App.*, 390; s. c., 4 *West. Rep.*, 861.]

Montana—Comp. Stat. (1887), § 97. "When an action is brought upon a written instrument and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the answer denying the same shall be verified."

§ 98. "When the defence to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted unless the plaintiff file with the clerk, within ten days after the filing of the answer, an affidavit denying the same, and serve a copy thereof on the defendant."

§ 99. "But the execution of the instrument mentioned in the two preceding sections is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same is, upon demand, refused an inspection of the original."

Nevada—Gen. Stat. (1885), § 3075. "When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the answer denying the same be verified."

§ 3076. "When the defence to an action is founded upon a written instrument, and a copy thereof is contained in the answer, or a copy is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the plaintiff file with the clerk, five days after the service of the answer, an affidavit denying the same."

New Hampshire—*Court Rules* of 1860, No. 44, provides that the signatures and indorsements of all instruments declared on will be considered as admitted at the first term, unless the defendant give notice upon the docket within the first four days of the term that they are disputed, and file his affidavit within that time, that the denial is not for the mere purpose of delay. 41 *N. H.*, 32.

New Mexico—*Comp. Laws* (1884), § 1914. "When any party to a suit, either as principal or security, or endorser, founded on any written contract, covenant or agreement whatsoever, shall deny his signature, he shall do the same under oath."

§ 1915. "In all cases where a suit has been instituted upon any writing obligatory, or may be so instituted, the execution of the instrument shall be regarded as proven, and the plea of *non est factum* shall be regarded as unavailing, until the person filing such plea shall have made oath that he never executed the said instrument, nor authorized any person to execute it for him."

(In *Luna vs. Mohr*, 1 *Pacif. Rep.*, 864, BRISTOL, J., writing the Court's opinion, says, *arguendo*: "A writing obligatory is a bond or some written obligation under seal. It is a term that is never applied to simple contracts, though they may be in writing. These two sections of our statutes are quite distinct and independent, and refer to two separate classes of written instruments. Section [1914] can only apply to simple written contracts, such as bills of exchange and promissory notes, and other written instruments not under seal. It specifically relates to the signature to any such simple contract of the party sought to be charged thereby, and the denial thereof by him, and to nothing else. The proper special plea under this provision of the statute would be that such signature is not the signature of the defendant. The plea that it is not his deed does not apply.")

§ 1922. "When a written instrument is referred to in a pleading, and the same or a copy thereof is incorporated in or attached to such pleading, the genuineness and due execution of such written instrument and of every indorsement thereon shall be deemed admitted, unless in a pleading or writing filed in the cause within the time allowed for pleading the same be denied under oath: provided, that if the party desiring to controvert the same is, upon reasonable demand, refused an inspection of such instrument, the execution

thereof shall not be deemed admitted by failure to deny the same under oath. Such demand must be in writing filed in the cause, and served upon the opposite party or his attorney : provided, that the provisions of this section shall not apply to deeds of conveyance of real estate."

New York. A similar rule as to verification of plea denying a writing but applicable only where it appeared by the declaration or bill of particulars that the document was the only cause of action was in force for a short time in New York. *Gen. Rule, May Term, 1840.* 22 *Wend.*, 644.

Code Civ. Pro., § 1776, dispenses with proof of incorporation in an action by or against a corporation unless the answer is verified and contains an affirmative allegation that the party is not a corporation.

Id., § 923. Notary's certificate on protest presumptive evidence unless an affidavit (verified answer not sufficient) is served of non-receipt of notice.

[The foregoing rules do not impair a pleading which does not comply, but only affect the question of evidence.]

Id., § 513. A defence which does not involve the merits of the action shall not be pleaded unless it is verified.

[The remedy is to return the pleading as a nullity, or if it contains other defences, to give notice that the unverified dilatory defence will be treated as a nullity.]

Pennsylvania—*The Act of March 28, 1835, § 2* (*Brightly's Purdon's Digest* (1883), p. 1356), required as a condition of entering judgment in case of want of an affidavit of defence in an action on an instrument of writing for payment of money, on book debts, in sc. fa. on judgments, and on mechanics' liens, that "the said plaintiff shall, within two weeks after the return of the original process (have) filed in the office of the prothonotary of the court hereby erected, a copy of the instrument of writing, book entries, record, or claim on which action has been brought."

By the *Act of May 25, 1887, P. L. 271, § 3*, in actions of assumpsit [which term by § 1 of this act includes what were formerly known as debt and covenant] plaintiff's declaration "should be accompanied by copies of all notes, contracts, book entries, or a particular reference to the records of any court within the county in which the action is brought, if any upon which the plaintiff's claim is founded, and a particular reference to such record, or to the record of any deed or mortgage or other instrument of writing recorded in such county, shall be sufficient in lieu of the copy thereof.

"The statement shall be signed by the plaintiff or his

attorney and in the action of assumpsit (as above defined) shall be replied to by affidavit."

For the effect of these acts see *Marlin vs. Waters*, 24 *Weekly N. C.*, 129; also see *Detmold vs. Fisher*, 3 *Id.*, 567.

[There are also special rules in Local Courts.]

Tennessee—*Code* (1884), § 4525. "Every written contract, instrument, or signature purporting to be executed by the party sought to be charged, his partner, agent, or attorney in fact, and constituting the foundation of an action, is conclusive evidence against such party, unless the execution thereof is denied under oath."

§ 4526. "If the party be dead, the personal representative may make the denial under oath, according to the best of his knowledge, information, and belief."

§ 4527. "The execution or assignment of instruments offered in evidence by the defendant, when allowed by law, is equally conclusive as when introduced by plaintiff, unless denied under oath."

§ 4528. "Whenever two or more persons bring a suit at law as partners upon an account, bill of exchange, bond or note, either before a magistrate or a court of record, it shall not be necessary for them to prove their partnership, unless the defendant files a plea in abatement, in writing, denying the partnership on oath."

Texas—*Rev. Stat.* (1879), Art. 1265. "An answer setting up any of the following matters, unless the truth of the proceedings appear of record, shall be verified by affidavit. . . .

"6. A denial of partnership as alleged in the petition, whether the same be on the part of the plaintiff or defendant." . . .

"8. A denial of the execution by himself or by his authority of any instrument in writing, upon which any pleading is founded, in whole or in part, and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed. Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit will be sufficient if it state that the affiant has reason to believe and does believe that such instrument was not executed by the decedent or by his authority.

"9. A plea denying the genuineness of the indorsement or assignment of a written instrument, as required by Article 271.

"10. That a written instrument upon which a pleading is founded, is without consideration, or that the consideration of the same has failed in whole or in part." . .

Article 271. "When a suit shall be instituted by any assignee or indorsee of any written instrument, the assignment or indorsement thereof shall be regarded as fully proved unless the defendant shall deny in his plea that the same is genuine, and moreover shall file, with the papers in the cause, an affidavit stating that he has good cause to believe, and verily does believe, that such assignment or indorsement is forged."

Utah—Comp. Laws (1888), § 3235. "When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted unless the answer denying the same be verified."

§ 3236. "When the defence to an action is founded upon a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant or his attorney."

§ 3237. "But the execution of the instruments mentioned in the two preceding sections is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same is, upon demand, refused an inspection of the original. Such demand must be in writing, served by copy, upon the adverse party or his attorney, and filed with the papers in the case."

§ 2306. "Checks, due bills, promissory notes, bills of exchange, and all orders or agreements for the payment of money or other thing of value, may be made or drawn by telegraph. . . . Whenever the genuineness or execution of any such instrument received by telegraph shall be denied on oath by or on behalf of the person sought to be charged thereby, it shall be incumbent upon the party claiming under, or alleging the same, to prove the existence and execution of the original writing from which the telegraphic copy or duplicate was transmitted."

Virginia—Code 1887, § 3279. "Where a bill, declaration, or other pleading alleges that any person made, endorsed, assigned, or accepted any writing, no proof of the fact alleged shall be required unless an affidavit be filed with the pleading putting it in issue, denying that such endorsement, assignment, acceptance, or other

writing was made by the person charged therewith, or by any one thereto authorized by him."

§ 3278. "No plea in abatement or plea of *non est factum* shall be received unless it be verified by oath."

West Virginia—Code 1887, c. 125, § 39. No plea in abatement or plea of *non est factum* shall be received unless it be verified by affidavit.

§ 40. Where a declaration or other pleading alleges that any person made, endorsed, assigned or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact be denied by an affidavit with the plea which puts it in issue.

Wisconsin—Annotated Stat. (1889), § 4192. "Every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed until the person by whom it purports to have been so signed or executed shall specifically deny the signature or execution of the same by his oath or affidavit, or by his pleading duly verified; but this section shall not extend to instruments purporting to have been signed or executed by any person who shall have died previous to the requirement of such proof."

§ 4193. "In all actions brought on promissory notes, or bills of exchange, by the indorsee, the possession of the note shall be presumptive evidence that the same was indorsed by the persons by whom it purports to be indorsed."

There are other statutes requiring the pleadings generally to be verified (*Colo. Code Civ. Pro.*, § 62), or "every pleading of fact" (*Wyoming Rev. Stat.* 1887, § 2489), without special reference to documents; and such requirements—being kindred to the general principle of the Codes that if any pleading in a cause is verified, a responsive pleading must be—are not noticed here.

For the application of such statutes to various instruments, in respects not of sufficient general importance to state at length, see

Accounts—*Ross vs. Yeatman*, 2 *Swan* (*Tenn.*), 144; *Dial vs. Taylor*, 8 *Tex.*, 267.

Accountable receipt—*Douglass vs. Cross*, 6 *Coldw.* (*Tenn.*), 416.

Acknowledgment or new promise—*Atkinson vs. Atkinson*, 2 *Colo.*, 381.

Assignment—*Hall vs. Freeman*, 59 *Ill.*, 55; *Baird vs. Best*, 13 *Ill. App.*, 385; *School Dist. vs. Carter*, 11 *Kans.*, 445; *Klyce vs. Black*, 7 *Baxt.* (*Tenn.*), 277.

Assumption clause—*Belton vs. Smith*, 45 *Ind.*, 291.

- Bill of lading—*St. Louis, Iron Mountain, etc., Ry. Co. vs. Knight*, 122 *U. S.*, 79; 30 *Law ed.*, 1077; 7 *Sup. Ct. Rep.*, 1132.
- Bond—*Herrick vs. Swartwout*, 72 *Ill.*, 340.
- Collateral instruments—*Stacey vs. Randall*, 17 *Ill.*, 467; *Jessup vs. Gray*, 7 *Blackf. (Ind.)*, 332.
- Contract of carrier—*Mo. River, F. S. & G. R. Co. vs. Wilson*, 10 *Kan.*, 105; *Sawyer vs. Dulany*, 30 *Tex.*, 479.
- Contract of freightage—*Jones vs. Walker*, 5 *Yerg. (Tenn.)*, 427.
- Contract of partnership—*Lewis vs. Lowery*, 31 *Tex.*, 663; *Mobile & M. R. Co. vs. Gilmer*, 85 *Ala.*, 422; s. c., 5 *So.*, 138.
- Declaration raising estoppel—*Shirk vs. Williamson*, 50 *Ark.*, 562; s. c., 9 *S. West.*, 307.
- Guaranty—*Andrews vs. Congar*, *Sup. Ct. U. S.*, Oct., 1880; 1 *Morrison's Transcrip.*, 29, (Jan., 1881); *Martin vs. Culver*, 87 *Ill.*, 49; *Partridge vs. Patterson*, 6 *Iowa*, 514; *Martin vs. Hazard Powder Co.*, 2 *Colo.*, 596; *Dietrich vs. Mitchell*, 43 *Ill.*, 40, (this latter case holding that a verified denial of the execution of a guaranty indorsed on a note requires plaintiff to give evidence not only of the signature, but of the overwriting, because an indorser in blank is presumed to be an indorser, not a guarantor).
- Indorsement—*Smith vs. Harrison*, 33 *Ala.*, 706; *Frazer vs. Brownrigg*, 10 *Ala.*, 817; *Stebbins vs. Goldthwait*, 31 *Ind.*, 159; *Berger vs. Henderson*, 5 *Blackf. (Ind.)*, 545; *Faught vs. Crosby*, 5 *Blackf. (Ind.)*, 554; *Broy vs. Carpenter*, 20 *Ind.*, 255; *Steinhelber vs. Edwards*, 2 *G. Greene (Iowa)*, 366; *Grogan vs. Ruckle*, 1 *Cal.*, 158, and rehearing, *Id.*, 193; *Youngs vs. Bell*, 4 *Cal.*, 201.
- Indorsement irregular—*Price vs. Lavender*, 38 *Ala.*, 389.
- Instrument under common counts—*Hoard vs. Little*, 7 *Mich.*, 468; *McMillen vs. Beach*, 38 *Mich.*, 397; *McCarthy vs. Neu*, 91 *Ill.*, 127.
- Insurance policy—*Illinois Mut. F. Ins. Co. vs. Marseilles Mfg. Co.*, 6 *Ill.*, 236; *Miller vs. Cohea*, 1 *La. O. S.*, 486; *Johnston vs. Ewing, etc., University*, 35 *Ill.*, 518; *Willard vs. Trustees M. E. Church*, 66 *Ill.*, 55.
- Letters—*Close vs. Judson*, 34 *Tex.*, 288; *Robinson vs. Dix*, 18 *W. Va.*, 528.
- Lost instrument—*Erschine vs. Wilson*, 20 *Tex.*, 77.
- Memorandum—In *Fulshear vs. Randon*, 18 *Tex.*, 275, it was held that a memorandum containing the party's name as the contracting party, if delivered by him, was within the statute although not subscribed.
- Receipt indorsed on another instrument—*Pears vs. Wil-*

son, 23 *Kan.*, 343; *May vs. Pollard*, 28 *Tex.*, 677; *Fisk vs. Miller*, 13 *Tex.*, 224; *Hendricks vs. Cameron*, 2 *Tex. App. Civ. Cas.*, § 351; *Pierce vs. Northey*, 14 *Wis.*, 9.
 Sealed instruments—*Clopton vs. Pridgen*, 8 *Tex.*, 308; *Muckleroy vs. Bethany*, 23 *Tex.*, 163; *Conner vs. Autrey*, 18 *Tex.*, 427; *Harris vs. Cato*, 26 *Tex.*, 338; *Lemon vs. Hanley*, 28 *Tex.*, 219.
 Subscription paper—*Unthank vs. Henry Co. T. Co.*, 6 *Ind.*, 125.
 Title deed—*Burkholder vs. Casad*, 47 *Ind.*, 418.

As to *what is a denial* within the statute, see

General denial. *Mobile & M. R. Co. vs. Gilmer*, 85 *Ala.*, 422; s. c., 5 *South. Rep.*, 138; *Shirk vs. Williamson*, 50 *Ark.*, 562; s. c., 9 *S. West. Rep.*, 307; *Evans vs. Southern Turnpike Co.*, 18 *Ind.*, 101; *Jones vs. Baker*, 76 *Iowa*, 303; s. c. as *Dickey vs. Baker*, 41 *N. W. Rep.*, 24; *Hyde vs. Brown*, 5 *La. O. S.*, 33; *Miller vs. Whitfield*, 16 *La. Ann.*, 10; *Bennett vs. Allison*, 2 *La. O. S.*, 419.

Non assumpsit—*Templeton vs. Hayward*, 65 *Ill.*, 178; *Thornton vs. Alliston*, 20 *Miss.*, 124; *Hinton vs. Husbands*, 4 *Ill.*, 187; *Knott vs. Planters' Bank*, 2 *Humph. (Tenn.)*, 493.

Non est factum—*State vs. Thompson*, 2 *Heisk. (Tenn.)*, 147; *Cleghorn vs. Robison*, 8 *Ga.*, 559; *Chambers vs. Games*, 2 *G. Greene (Iowa)*, 320; *Longley vs. Norvall*, 2 *Ill. (1 Scam.)*, 389; *Baker vs. Spangler, Tappan (Ohio)*, 210 (plea with notice).

Specific denial—*Carle vs. Cornell*, 11 *Iowa*, 374; *Spooner vs. Gilmore*, 136 *Mass.*, 248; *Douglass vs. Matheny*, 35 *Iowa*, 112; *True vs. Dillon*, 138 *Mass.*, 347.

Denial not positive—*Berry vs. Ferguson*, 58 *Ala.*, 314; *Adamson vs. Wood*, 5 *Blackf. (Ind.)*, 448; *Fannon vs. Robinson*, 10 *Iowa*, 272; *Johnston Harvester Co. vs. Clark*, 31 *Minn.*, 165; s. c., 15 *N. West. Rep.*, 252; *Parr vs. Johnston*, 15 *Tex.*, 294; *Smith vs. Ehnert*, 47 *Wis.*, 479.

General issue with notice—*Hunt vs. Weir*, 29 *Ill.*, 83.

Special plea of facts amounting to general issue—*Bryan vs. Wilson*, 27 *Ala.*, 208.

§ 616. *Necessary allegation to call for sworn denial.*
 —Statutes requiring a plea or answer denying the execution of written instruments to be verified, may be held not applicable if the declaration or complaint¹ to which the plea or answer is interposed does not aver “signa-

ture" or "execution," or other fact distinctly bringing the case within the statute.

¹ Notice of special matter with declaration not a part of the declaration within such a rule. *Garrett vs. Teller*, 22 *Wend. (N. Y.)*, 643.

Kelly vs. Paul, 3 *Gratt. (Va.)*, 182. (Action on draft, alleging that defendant made it, but not alleging that he or any person for him signed it. *Held*, reversible error to admit it without proof of handwriting. Plaintiff must show genuineness of signature if he does not allege that defendant signed or had it signed.)

Washington vs. Hobart, 17 *Kans.*, 275. (Allegation of transfer of the note sued on, with nothing to indicate that the transfer was in writing, not enough to call for sworn denial.)

Pattie vs. Wilson, 25 *Kans.*, 326.

Shepherd vs. Frys, 3 *Gratt. (Va.)*, 422. (Holding that the Va. Act of Feb. 5, 1828 (*Supp. Rev. Code*, ch. 206, p. 265), dispenses with proof of handwriting only where the declaration alleges that defendant, or the person stated to have made the writing sued on, subscribed his name thereto; and hence where there was no such allegation in an action on a partnership note, dissolution, with notice before the giving of the note, was available although there was no sworn denial of execution.)

Peoria M. & F. Ins. Co. vs. Walser, 22 *Ind.*, 73. (Policy not signed by the company's officers, but only countersigned by their agent,—*held* not "executed" within the meaning of the statute.)

The provision of the Alabama Code, that in an action on a written instrument purporting to be signed by defendant, the instrument shall be admissible as evidence without preliminary proof of its execution, unless its execution is denied by plea verified by affidavit (§ 2770), should be construed to apply to a written instrument which, though not signed by defendant, is shown by the averments of the complaint to be binding on him as the assignee or successor in law of the person who signed it. *Mobile, etc., R. Co. vs. Gilmer*, 85 *Ala.*, 422; 5 *South.*, 138.

Edmonds vs. Montgomery, 1 *Iowa*, 143. (Execution of assignment of judgment not being denied, need not be proved, even though what purported to be an assignment was indorsed on the record of judgment.)

In *Nesbitt vs. Pearson*, 33 *Ala.*, 668, under a rule of court, it was *held* that a note unindorsed was admissible in

the assignee's action without proof of ownership, because assignment was not denied.

§ 617. *Execution: delivery: seal*.—Whether, under statutes requiring sworn denial of the “execution” of written instruments, failure to deny execution affects the question of evidence or burden as to delivery or seal, compare

Affirmative—Parkinson *vs.* Boddier, 10 *Colo.*, 503; s. c., 15 *Pacif.*, 806. (Delivery.)

s. p., Lloyd *vs.* Howard, *L. J.*, 20 *Com. L.*, 1.

Ketcham *vs.* New Albany, etc., R. R. Co., 7 *Ind.*, 391. [citing authorities]; Miller *vs.* Voss, 40 *Ind.*, 307. (Indorsee against maker. Unsworn denial of execution admits indorsement by payee as alleged, and if he indorsed it, he must have had it in his possession, and this raised *prima facie* presumption of delivery to him by maker.)

Home Ins. Co. *vs.* Gilman, 112 *Ind.*, 7. (Unsworn denial of execution of insurance policy precludes evidence of irregularity in delivery.)

Phoenix Ins. Co. *vs.* Rowe, 117 *Ind.*, 202; 20 *N. East.*, 122. (So of authority to deliver.)

City of Evansville *vs.* Morris, 87 *Ind.*, 269, 277; s. c., 11 *Wash. L. Rep.*, 600. The Court say: “If the answer had alleged that the bond was not signed by the appellees, or was not delivered by them personally, or by any person authorized to make the delivery, no one would pretend that such answer, in the absence of a verification, would be worth anything. Yet this answer alleges nothing more. It is true that it does not, in terms, allege that the person who made the delivery had no authority to make it, but the fact from which such conclusion is drawn, viz., that the authority was given on Sunday, is averred, and this amounts to no more than an averment that the bond was delivered without authority.”

Sully *vs.* Goldsmith, 49 *Iowa*, 690. (Holding that a denial not of the “signature,” as contemplated by the statute, but of the “execution,” did not shift the burden of proof as to signature, but nevertheless allowed defendant to disprove the signature.)

Hammerslough *vs.* Cheatham, 84 *Mo.*, 13. (Holding that the statute only applies to the manual signing.)

Nielson *vs.* Schuckman, 53 *Wisc.*, 638. (Holding that the sole object of *Wis. R. S.*, § 4192, is to dispense with proof of the signature to a written instrument, where,

such signature has not been denied under oath; and the words "executed" and "execution" in that section are used as strictly synonymous with "signed" and "signature.")

In the case of a sealed instrument, the proper sealing is admitted. *Chambers County vs. Clews*, 21 *Wall. (U. S.)*, 317. Compare *Holden vs. Jenkins*, 125 *Mass.*, 446.

Negative—*Cleghorn vs. Robison*, 8 *Ga.*, 559. (Holding that if signing be not denied an allegation that delivery was without the signature of a co-surety agreed for, need not be verified.)

Bryan vs. Kelly, 85 *Ala.*, 569; s. c., 5 *South. Rep.*, 346. Plaintiff suing on a constable's official bond, alleged that he was "required" to give it, but did not indicate the authority under which it was given. *Held*, that as its execution was not denied by sworn plea, nor its consideration impeached, it was admissible.

§ 618. *Evasive or loose denial*.—An evasive or loose denial which does not meet the requirement of the statute with reasonable certainty is not sufficient.

Davis vs. Cleghorn, 25 *Ill.*, 212. (Denial of handwriting, not a denial of signature.)

Smallhouse vs. Thompson, 17 *Ind.*, 204. (Allegation of notice from third person not to pay, not a denial.)

Hasselback vs. Sinton, 17 *Ind.*, 545. ("Did not undertake and promise as averred," not sufficient.)

Framingham Bank vs. Gay, 75 *Mass.*, 241. ("Does not owe in manner and form as alleged," not sufficient.)

Sheldon vs. Middleton, 10 *Iowa*, 17. (Admitting similar one, but leaving plaintiff to prove identity, not sufficient.)

Kinman vs. Cannefax, 34 *Mo.*, 147. (Denying the making of any such note as alleged, but admitting a different one, not sufficient.)

Luna vs. Mohr, 1 *Pacif. Rep.*, 860; s. c., 1 *West. Coast Rep.*, 673. (Action on bill of exchange. Plea that it was not his deed, bad.)

Woods vs. Watkins, 40 *Pa. St.*, 458. (Denying all recollection of having given or made, and denying consideration, not sufficient.)

Wade vs. Pratt, 12 *Heisk (Tenn.)*, 231. (Denial must suffice to support indictment for perjury.)

School District No. 1 vs. Lyford, 27 *Wisc.*, 506. (Denial of executing such instrument to plaintiff, bad, because only denying identity of plaintiff.)

Van Hook vs. Letchford, 35 *Tex.*, 599. (Executor's denial of knowledge, etc., although having some means of knowledge, not enough to "cast suspicion.")

Snyder vs. Van Doren, 46 *Wisc.*, 602. (Denial of "execution," not a denial of signature.)

Spooner vs. Gilmore, 136 *Mass.*, 248. ("Denies the signature of the alleged note," etc., not a denial "of the genuineness of the signature.")

Anderson vs. Sloan, 1 *Colo.*, 484. (Denial of signature of instrument under slightly different name, bad.)

Bancroft vs. Paine, 15 *Ala.*, 834. (Denial of indorsement and title, etc., bad on demurrer, where statute requires affidavit to belief of forgery.)

Montgomery vs. Culton, 18 *Tex.*, 736. (Allegation that it was "fraudulently made" or that it was "pretended" not enough.)

s. p., *White vs. Camp*, 1 *Fla.*, 94. (Holding that the affidavit should not be in the alternative, nor double, but must apprise plaintiff what facts he would be required to prove.)

Bentley vs. Dorcas, 11 *Ohio St.*, 398, 408. (Denial that the copy is a true copy, not enough, for it admits its legal effect.)

The rule in Michigan is that the denial is not to be strictly construed, but is sufficient if it shows that the pleader intended in good faith to contest the question. *Anderson vs. Walter*, 34 *Mich.*, 113; *McCormick vs. Bay City*, 23 *Mich.*, 457.

What departure from the statutory or usual formula will vitiate a verification, see 1 *Abb. New Pr. & F.*, 500.

§ 619. *Affidavit or pleading.*—Whether affidavit and verified plea (or answer) are mutually equivalent, so that either satisfies a requirement of the other, compare :

Weaver vs. Carnall, 35 *Ark.*, 198. (Holding that a statute requiring an affidavit is satisfied by a proper plea properly verified.)

Bailey vs. Valley Nat. Bank, 127 *Ill.*, 332. (Holding that a plea which does not at common law raise the issue, accompanied by notice of denial and affidavit to the truth of the denial, is not enough.)

Arnold vs. Rock River Valley Union R. R. Co., 5 *Duer* (*N. Y.*), 207; *Burrall vs. DeGroot*, *id.*, 379; *s. p.*, 1857, *Young vs. Catlett*, 6 *id.*, 437; and see *Pierson vs. Boyd*, 2 *id.*, 33. (Statute requiring affidavit denying receipt of

notice of protest by indorser, not satisfied by allegation in answer.)

An affidavit of merit is not a sufficient affidavit. *City of Central vs. Wilcoxon*, 3 *Colo.*, 566. Although a verified plea may be a sufficient affidavit of merits. *Kimbark vs. Blundin*, 6 *Ill. App.*, 539.

In *Bailey vs. Valley Nat. Bank*, 127 *Ill.*, 332, it was held that a verified notice of special matter denying was not equivalent to a verified plea denying, though accompanying a plea of *non assumpsit*.)

§ 620. *Who may verify*.—Unless the statute otherwise indicates, the principles applicable to verification of pleadings generally may be applied.¹

Thus if the denial is by a person permitted to make it by the statute, it is no objection that he would not be competent to testify as a witness.²

If the party is a corporation, the oath may be by the appropriate officer or agent.³

¹ In *Kingsland vs. Cowman*, 5 *Hill (N. Y.)*, 608, an affidavit on information and belief verifying a plea of usury, relied on to enable the defendant to examine plaintiff under oath, was held insufficient, there being two defendants, and the facts of the defence peculiarly within the knowledge of one, while the affidavit was made by the other alone.

² *Hunter vs. Probst*, 47 *Ind.*, 359; s.p., *Abb. New Pr. & F.*, 25.

³ See, for instance, *Barrett Mining Co. vs. Tappan*, 2 *Colo.*, 124; *Hitchcock vs. Galveston*, 3 *Woods. (U. S. C. Ct.)*, 287; *Eborn vs. Zimpleman*, 47 *Tex.*, 503. (Agent for administrator.)

For excuse by reason of privilege against criminating one's self, see 2 *Abb. New Pr. & F.*, 438.

§ 621. *Information and belief*.—Whether an oath on information and belief is enough, compare:

Linch vs. Litchfield, 16 *Brad. Ill. App.*, 612. (Action on a city officer's bond. Affidavit on information and belief merely, that the ordinances relied on had not been duly published,—held, not a sufficient denial, within the provision of the city charter that an ordinance should be

admitted without proof of publication, "unless it is denied under oath.")

Kingsland vs. Cowman, 5 *Hill* (N. Y.), 608. (A statute requiring the party "to verify the truth" of his plea, etc. (N. Y. L., 1837, as to plea of usury), or "by affidavit prove the truth thereof or show some probable matter to the Court to induce them to believe that the fact of such dilatory plea is true" (4 & 5 *Anne*, c. 16, § 11), is not satisfied by oath to belief; but "the affidavit must be positive as to the truth of every fact contained in the plea, leaving nothing to be collected by inference.")

Brayley vs. Hedges, 52 *Iowa*, 623. (Holding that under *Iowa Code*, § 2730,—which provides that unless the genuineness of the signature of an instrument referred to in the pleadings be denied under oath, it shall be deemed genuine and admitted,—a denial of knowledge or information sufficient to form a belief is a denial; and the effect of not verifying it is only to leave the burden of proof on defendant.

[In **Henry vs. Evans**, 58 *Id.*, 560, judgment given on the pleadings for plaintiff was sustained, when there was an unsworn denial on information and belief. But no evidence was adduced; and the decision was therefore right under the rule laid down in **Brayley vs. Hedges**. But the Court seem inclined to place their decision on the idea that the omission to verify the denial was an omission to take issue. The point does not seem to have received much consideration, and **Brayley vs. Hedges** does not appear to have been referred to.]

Gawtry vs. Doane, 51 *N. Y.*, 84, affg 48 *Barb.*, 148. (Indorser's denial under *N. Y. Code Civ. Pro.*, § 923, of receipt of notice of protest, made for the purpose of excluding proof of service by mere certificate of notary, must be positive, not on information and belief.)

In **Barker vs. Cassiday**, 16 *Barb.* (N. Y.), 177, a denial in the form that the party has no "knowledge, recollection, or belief" of receiving a notice of protest was held sufficient to exclude the certificate; the Court saying: "This is going about as far as most prudent and conscientious men would be prepared to go in relation to the receipt of notice several years before."

§ 622. *Translation*.—Statutes requiring sworn denial of written instruments, in order to put them in issue or to require proof in the first instance from the party pleading them, apply to an instrument in a foreign

language, even though a translation was pleaded as such, instead of pleading a copy in the foreign language; and if the denial be not verified, the original stands admitted, or may be received, without proof of execution.

Christenson *vs.* Gorsch, 5 *Iowa*, 374. (Error to exclude.)

§ 623. *Signature by mark*.—Signature by mark is a “signature” within the meaning of statutes requiring sworn denials of the signature of written instruments.

Wimberly *vs.* Dallas, 52 *Ala.*, 196. [Overruling, on this point, *Flowers vs. Bitting*, 45 *Ala.*, 448.] BRICKELL, C. J., says: “It was not material how the note was signed, whether with a mark, or with the real name of the appellant, or with a fictitious name, or with any designation he had thought proper to adopt. Citing *Brown vs. McClanahan*, 9 *Baxt. (Tenn.)*, 347.”

§ 624. — *abbreviation in name; misnomer; and change of name*.—Under such statutes, a defendant who has failed to verify his denial of a contract alleged to have been executed by him as in his full name, cannot exclude the original for variance because an initial was used in the signature, for execution is admitted.¹

And the admission of execution includes an admission of allegations, in the pleading which set forth the instrument, of a change of name made by the party executing it.²

¹ *Lee vs. Mendel*, 40 *Ill.*, 359.

Hunt vs. Raymond, 11 *Ind.*, 215.

Frye vs. Menkins, 15 *Ill.*, 339. (The misnomer here was *idem sonans*—Elnathan for L. Nathan.)

² *Lawson vs. Sherra*, 21 *Ind.*, 363. (Marriage of female payee, and indorsement in married name.)

§ 625. — *execution in firm name*.—If the instrument sued on is pleaded as having been signed in an apparent partnership name, an allegation of execution by the de-

defendants sufficiently implies partnership, and that the contract was within the scope of the business, or that it was specially authorized by each member; and an admission or denial of execution includes in effect an admission or denial of the necessary authority.¹

And a defendant's denial that it was "executed by him or by any one authorized to bind him in the premises," is good.²

If the instrument is pleaded as having been signed by defendants severally, or as joint and several makers, with nothing to indicate partnership, the pleading does not let in an instrument signed in an apparent firm name.³

¹ *Palmer vs. Scott*, 68 *Ala.*, 380. (Action on acceptance in firm name. Only defendant M. defended. The evidence showed the draft in suit was given by defendant S., M.'s former partner, for S.'s individual liability to an insurance agent for premiums collected by S. which were commingled with the firm's moneys without his knowledge or consent. Court charged that M. was not liable unless he knew of or consented to commingling of funds, or the acceptance. *Held*, error. This defence could not be made without sworn plea by M. denying his execution of the acceptance, and he interposed no such plea.)

Thomas vs. Clark, 2 *McLean (U. S. C. Ct.)*, 194.

McGill vs. Wallace, 22 *Mo. App.*, 675.

Williams vs. Gilchrist, 11 *N. H.*, 535.

Memphis G. Sav. Inst. vs. Hargan, 9 *Heisk. (Tenn.)*, 496.

Drew vs. Harrison, 12 *Tex.*, 279.

Cleveland vs. Duggan, 2 *Tex. App. Civ. Cas.*, § 82.

s. p., *Buck vs. Smith*, 2 *Colo.*, 500. Holding that in an action upon a promissory note, executed in the firm name, a verified plea denying its execution puts the partnership in issue.)

An allegation of the indebtedness of the defendants, copartners trading under a specified firm name, is a sufficient allegation of partnership, under the Maryland Statute of 1886, which provides that if the copartnership or incorporation of any of the parties is alleged, etc., it shall be deemed admitted unless there is an affidavit to the contrary. *Thorne vs. Fox*, 67 *Md.*, 67; s.c., 8 *Centr. Rep.*, 302.

* *Zuel vs. Bowen*, 78 *Ill.*, 234.

Johl vs. Fernberger, 10 *Heisk. (Tenn.)*, 37. (On demurrer.)
s. p., of a denial as to a joint and several note. *Ludlow vs. Berry*, 62 *Wisc.*, 78.

One defendant's sworn allegation that he was not a partner, is not a denial of execution. *Ferguson vs. Wood*, 23 *Tex.*, 177.

* *Neteler vs. Culies*, 18 *Ill.*, 188. (Plaintiffs declared, in usual form, against defendants as joint and several makers. The note was signed by "Hurds & Neteler." There was no allegation that defendants were partners, or used the above signature. Defendants pleaded only general issue. The only evidence was a note signed as above. *Held*, error to overrule objection for variance. To dispense with proof, the note offered in evidence should have corresponded with the allegations. Reversed, with leave to amend declaration.)

§ 626. — *authority of agent*.—If the instrument appears to be executed for defendant by an agent, an admission or denial of execution includes in effect an admission or denial of the authority of the agent.

Sorelle vs. Elmes, 6 *Ala.*, 706. (Plea that agent who signed had only conditional authority, and condition was not performed, amounts only to a denial of execution, and if not verified may be struck out.)

Lee vs. Grimes, 4 *Colo.*, 185. (In absence of sworn plea, not necessary to prove agent's authority.)

Habersham vs. Lehman, 63 *Ga.*, 380.

Delahay vs. Clement, 3 *Ill.* (2 *Scam.*), 575.

Nimmon vs. Worthington, 1 *Ind.*, 376; *Denny vs. N. W. Christian University*, 16 *Ind.*, 220; *Allen vs. Thaxter*, 1 *Blackf. (Ind.)*, 399. (Deed alleged to have been executed by attorney in fact.)

Austin vs. Townes, 10 *Tex.*, 24; *Reid vs. Reid*, 11 *Tex.*, 585; *Herndon vs. Ennis*, 18 *Tex.*, 410; *Brashear vs. Martin*, 25 *Tex.*, 202.

Contra, *Riser vs. Snoddy*, 7 *Ind.*, 442; *Bayly vs. Givens*, 29 *La. Ann.*, 546; *Pope vs. Risley*, 23 *Mo.*, 185.

Compton vs. Western Stage Co., 25 *Tex. Supp.*, 67. (It was held that in a suit on a writing in which defendant's name nowhere appears, a general denial though unsworn puts on plaintiff the burden to show the agent's authority to bind defendant.)

Contra, *Alabama, etc., Co. vs. Brainard*, 35 *Ala.*, 476. (Ac-

tion on a bill of exchange. *Held*, that the peculiar terms of the former Alabama Code, which mention "all written instruments purporting to be signed by the defendant, his partner, agent," etc., construed in connection with other clauses, included one which did not purport but was alleged to be signed by the party or his agent, etc.

§ 627. — *authority of corporate officers.* Where, as in the case of a contract by a corporation, valid execution necessarily involves the authority of the agent or officer who performed the act, an admission or denial of execution includes in effect an admission or denial of the authority of the agent or officer signing.

Montgomery & E. R. Co. vs. Trebles, 44 *Ala.*, 255; *Oxford Iron Co. vs. Spradley*, 46 *Ala.*, 98.

Private corporations.] *McIntire vs. Preston*, 10 *Ill.*, 48. (Indorsement by secretary of note payable to corporation. *Held*, that by failure to verify denial, the secretary's authority, and hence, the assignment from the company, was admitted, and the filling up by plaintiff of the indorsement so as to show it was made by the company, on the trial, was sufficient.)

Walker vs. Krebaum, 67 *Ill.*, 252; *Goodrich vs. Reynolds*, 31 *Ill.*, 490. (s. p., indorsement by president.)

Barnum vs. Kennedy, 21 *Kan.*, 181. (Express allegation that president was authorized to assign a judgment,—*held*, admitted by not verifying denial.)

Patrick vs. Boonville Gas Light Co., 17 *Mo. App.*, 462.

Nicholas vs. Oliver, 36 *N. H.*, 218. [The dictum here as to the effect of omitting to deny is criticised in 41 *N. H.*, 32.]

Public corporations.] *City of Central vs. Brown*, 2 *Col.*, 703. (City warrants issued by mayor and city clerk. *Held*, error to treat sworn denial of execution as an admission of the officer's authority.)

Clark vs. Des Moines, 19 *Iowa*, 199. (Not error to treat unverified answer as admitting authority.)

Clark vs. Polk County, 19 *Iowa*, 248. (Action on county warrants: same ruling, the Court holding that the requirement of verified denial applies to counties, as municipal corporations, as well as to natural persons.)

Great Falls Bank vs. Farmington, 41 *N. H.*, 32. (Action on note signed by town selectmen. *Held*, error to receive

evidence that there was no vote recorded authorizing signing of notes by selectmen in the year the note in suit was made. Failure to give notice of denial, as prescribed by rule, admitted genuineness and due execution.) [The Court discusses the question at length, approving and following *Williams vs. Gilchrist*, 11 *N. H.*, 535, and examining *Nicholas vs. Oliver*, 36 *N. H.*, 218, and criticising that case because of the attempt, by dictum of the judge, to qualify and limit the doctrine of 11 *N. H.*, 535.]

§ 628. *Question of ownership*.—A plea that the note was not made to plaintiff, but to him and a third person, as partners, is in effect a denial of execution, within the meaning of statutes requiring a denial of a written instrument to be verified.

Fowler vs. Bender, 18 *Ark.*, 262.

[Compare *Manning vs. Maroney*, 87 *Ala.*, 563; s. c., 6 *South Rep.*, 343. (Indorsee against drawer of a bill of exchange. *Held*, proper to receive evidence of the bill of exchange (against objection that the indorsement on it showed that it was not defendant's property), because as the instrument was averred to be the property of the plaintiff transferred to him by indorsement of the payee, and there was no sworn plea denying ownership, the validity of the transfer could not be raised under the general issue. *Code Ala.* (1886), 2676, 2770; citing *Agee vs. Medlock*, 25 *Ala.*, 281.)]

§ 629. *Instrument executed by several*.—Whether, in the case of an instrument executed by several persons, a sworn denial by one avails on behalf of the others, compare:

Affirmative.—State *ex rel.* *Griswold vs. Blair*, 32 *Ind.*, 313.
Wren vs. McLaren, 48 *Mich.*, 197.

Hogg vs. Orgill, 34 *Pa. St.*, 344.

Negative.—*Pursley vs. Morrison*, 7 *Ind.*, 356.

Taylor vs. Gay, 6 *Blackf. (Ind.)*, 150.

Robinson vs. Lair, 31 *Iowa*, 9.

Whether, where there are several defendants, and only one of them executed the instrument, his admission by fail-

ure to verify his denial dispenses with proof as against the others, query? *Chaytor vs. Brunswick-Balke-Clender Co.*, 71 *Tex.*, 588; s. c., 10 *South West. Rep.*, 250. In *Walker vs. Sleight*, 30 *Iowa*, 310, it seems to have been held that a debtor sued by an assignee cannot put in issue the assignor's signature even by a sworn denial under the statute, upon the ground that the signature can only be put in issue by the party whose signature it is alleged to be.

In a suit upon an attachment bond, where the only issue is raised by the sureties' sworn plea of *non est factum*, proof of the execution by the parties interposing the plea is sufficient to entitle the plaintiff to recover, without proving the signature of the principal if his liability is not in issue. *Fitzsimmons vs. Hall*, 84 *Ill.*, 538.

§ 630. *Not a partner.*—If the instrument appears to be executed by a firm, an admission or denial of execution includes in effect an admission or denial of the partnership, or of the membership of the pleader.¹

The same principle applies where partners sue on an instrument payable to the firm.²

¹ *New York, etc. Co. vs. Meyer*, 51 *Ala.*, 325; *Goetter vs. Head*, 70 *Ala.*, 532; *Guice vs. Thornton*, 76 *Ala.*, 466; *Fairchild vs. Grand Gulf Bank*, 6 *Miss.* (5 *How.*), 597.

Phaup vs. Stratton, 9 *Gratt. (Va.)*, 615. Dissolution before execution not provable because execution not denied under oath. ALLEN and DANIEL, JJ., dissented, being of opinion that "execution" means here only manual signature.)

[s. p., *Thomas vs. Reister*, 3 *Ind.*, 369. Revocation of agency.)]

As to the rule where the denial or admission is by one partner only, see *Vance vs. Funk*, 3 *Ill.* (2 *Scam.*), 263; *Stevenson vs. Farnsworth*, 7 *Ill.*, 715; *Davis vs. Scarritt*, 17 *Ill.*, 202; *Haskins vs. D'Este*, 133 *Mass.*, 356; and compare § 629.

In *Ferguson vs. Wood*, 23 *Tex.*, 177, it was held that a denial of ever having been a partner was bad, because it did not deny execution.

² *Rees vs. Simons*, 10 *Ind.*, 82; *Fletcher vs. Dana*, 4 *Blackf. (Ind.)*, 377.

§ 631. *Instruments executed by third person*—Sub-

scribing witness.—Statutes requiring sworn denials of the execution of written instruments may, unless otherwise expressed, be construed as not extending to the case of an instrument alleged as executed by a person not a party to the action;¹ and as not applying to the signature of a subscribing witness.²

¹ *Heath vs. Lent*, 1 *Cal.*, 410.

Grimsley vs. Klein, 2 *Ill.* (1 *Scam.*), 343.

Mahon vs. Sawyer, 18 *Ind.*, 73; *Barnett vs. Cabinet Makers' Union*, 28 *Ind.*, 254.

Ashworth vs. Grubbs, 47 *Iowa*, 353.

Bradford vs. Cooper, 1 *La. Ann.*, 325.

Swales vs. Grubbs (*Ind.*, 1890), 25 *North East. Rep.*, 877. (Heirs, etc.)

[In *Spicer vs. Smith*, 23 *Mich.*, 96, it was held that the statute did not apply to the indorsement of a third person under whom plaintiff claims title.]

For a different view see *Belton vs. Smith*, 45 *Ind.*, 291.

Ellis vs. Planters' Bank, 8 *Miss.* (7 *How.*), 235.

Bennett vs. Logue, 29 *Tex.*, 282.

Yeary vs. Cummins, 28 *Tex.*, 91. (Title bond alleged to have been made by ancestor,—*held*, admitted for want of sworn denial.)

Habersham vs. Lehman, 63 *Ga.*, 380. (Holding that the Georgia Code, § 2855, applied though the name of the indorser purport to have been signed not by himself but by his agent or attorney in fact, and though the action be not against the indorser, but against the maker.)

² The words in the Massachusetts Statute of 1877, ch. 163,—“any signature to a written instrument,”—do not apply to the signature of a witness, though essential to take the instrument relied on out of the statute of limitations. *Holden vs. Jenkins*, 125 *Mass.*, 446.

§ 632. *Revocation of authority*.—In the case of an instrument alleged as executed by a third person in a representative capacity, an allegation of revocation of authority before the instrument was executed is in effect a denial of execution within the meaning of the statute.

Thomas vs. Reister, 3 *Ind.*, 369.

s. p., *Phaup vs. Stratton*, 9 *Gratt. (Va.)*, 615. (Dissolution of partnership.)

§ 633. *Lost instrument*.—Unless otherwise provided,¹ the statute applies to a lost instrument pleaded as such, and not denied under oath.²

¹ *Boylston vs. Sherran*, 31 *Ala.*, 538.

² *Mays vs. Foster*, 26 *Kans.*, 518.

§ 634. *Plaintiff not the real party in interest*.—If the instrument is pleaded in a manner to show apparent ownership in plaintiff, an admission or denial of execution¹ (or of assignment to plaintiff if he pleaded title by assignment), includes in effect an admission or denial of his ownership.

If there be an admission of his ownership by failure to deny execution under oath, an unsworn allegation that he is not the real party in interest does not avail,² even though coupled with an allegation that a third person is the real owner, if no facts substantiating such ownership are stated.³

¹ *Mobile Life Ins. Co. vs. Egger*, 67 *Ala.*, 134; *Preston vs. Dunham*, 52 *id.*, 217.

² *Tarver vs. Nance*, 5 *Ala.*, 712; s. p., *Jennings vs. Cummings*, 9 *Port. (Ala.)*, 309.

³ *Monroe vs. Fohl*, 72 *Cal.*, 568.

But where plaintiff's own evidence showed that he was not owner,—*held*, proper to instruct for defendant, though there was no sworn denial. *Eakin vs. Burger*, 1 *Sneed (Tenn.)*, 417.

§ 635. *Other issues*.—A verified denial of a written instrument is not impaired by other defences in the same answer containing admissions.

Palmer vs. Poor, 121 *Ind.*, 135; s. c., 6 *Law. R. Anno.*, 469.

§ 636. *Amending*.—If, after issued joined, plaintiff is allowed to amend by pleading for the first time the written instrument, defendant is entitled to amend by interposing a sworn denial.¹

The power of the Court to allow amendment of pleadings, extends to the case of an amendment by interposing a sworn denial of an instrument, the execution of which was admitted by omitting to verify a denial in the original pleading.²

Otherwise where the statute is so framed that the failure to interpose such a denial gives the adverse party the benefit of the admission as matter of right.³

¹ *McCarthy vs. Neu*, 91 *Ill.*, 127. (Holding it error to refuse defendant leave to amend.)

² *Taylor vs. Colvin*, *Wright (Ohio)*, 449.

s. p., in *Mass.*, where, however, the sworn denial is not perhaps part of the pleading. *Ham vs. Kerwin*, 146 *Mass.*, 378.

Anderson vs. Hance, 49 *Mo.*, 159. (Error to refuse leave to amend where the defendant applying was not the party to the instrument, and excused his admission.)

Stanton vs. Burge, 34 *Ga.*, 435. (Executor allowed to file sworn plea by way of amendment, upon appeal.)

Akin vs. Ordinary of Bartow County, 54 *Ga.*, 59; *Hayden vs. Atlanta Cotton Factory*, 61 *Ga.*, 233. (Filing sworn plea allowed at later term, although for the first time.)

s. p., *Benedict vs. Swain*, 43 *N. H.*, 33. (Holding that the rule of court should not be applied where the instrument had not been pleaded so as to afford opportunity.)

In *McPhaul vs. Lapsley*, 20 *Wall.*, 264, a tardy plea was held properly rejected.

The ruling in *Kingsland vs. Cowman*, 5 *Hill (N. Y.)*, 608, that the judge at the trial could not receive a new affidavit by way of amendment turned doubtless on the restricted power of circuit judges at that time. The "leave of court" which was there said to be necessary can now doubtless be granted at the trial.

³ *Thorne vs. Fox*, 67 *Md.*, 67; s. c., 8 *Atl. Rep.*, 667.

9. STATUTORY TRAVERSE OF ANSWERS AND REPLIES.

§ 637. New matter.

638. Denial not equivalent to an affirmative contrary allegation.

639. Denial in form of new matter.

§ 640. Avoidance in form of counterclaim.

641. Counterclaim not properly characterized in pleading it.

§ 637. *New matter*.—The Code performs, for plaintiffs, the office of a pleader who can commit no mistake, in replying to an answer which sets up, by way of defence, new matter not constituting a counterclaim.

Garner vs. Manhattan Building Asso., 6 *Duer* (N. Y.), 539. In some States all new matter in the answer is equally controverted. *Arkansas—Mansf. Dig.*, Stat. 1884, § 5024; *California—Civ. Pro., Deering's Anno. Code* 1885, § 462; *Cheang Kee vs. United States*, 3 *Wall.* (U. S.), 320; *Idaho—Rev. Stat.* 1887, § 4217; *Louisiana—Voorhies' Code of Pr.* 1882, Art. 329.

§ 638. *Denial not equivalent to an affirmative contrary allegation*.—A specific denial in an answer, of an unnecessary allegation of non-payment in the complaint is not equivalent to an allegation of payment.

Hummel vs. Moore (U. S. C. Ct., Colo.), 25 *Fed. Rep.*, 380; s. c., 20 *Reporter*, 777.

§ 639. *Denial in form of new matter*.—Under statutes to the effect that new matter in an answer is admitted by failure to reply, facts which are only a traverse of the complaint, and might be proved under a denial, are not deemed new matter, though alleged as if such, and are not admitted by failure to reply.

Sylvis vs. Sylvis, 11 *Colo.*, 319.

Butler vs. Edgerton, 15 *Ind.*, 15.

Netcott vs. Porter, 19 *Kans.*, 131.

Engel vs. Bugbee, 40 *Minn.*, 492; s. p., *Pinger vs. Pinger*, *id.*, 417.

Mauldin vs. Ball, 5 *Mont.*, 96. (Citing many cases.)

State vs. Williams, 48 *Mo.*, 210.

Watkins vs. Southern Pacif. R. Co. (*U. S. D. Ct. Oreg.*), 38 *Fed. Rep.*, 711; s. c., 4 *Law R. Anno.*, 239.

s. p., *Union Ins. Co. vs. Murphy* (*Pa.*, 1886), 4 *Atl. Rep.*, 352.

So also where an answer contained an admission of a supposed allegation of the complaint not actually contained therein,—*held*, that the admission was not an allegation needing a reply. *Hoisington vs. Armstrong*, 22 *Kans.*, 110.

§ 640. *Avoidance in form of counterclaim.*—Under statutes to the effect that a counterclaim is admitted by failure to reply, matter which is merely defensive, and does not in law amount to a cause of action against the plaintiff, is not admitted by failure to reply, even though the pleader has set it up as a counterclaim.

Walker vs. Sioux City, etc., Land Co., 66 *Iowa*, 751; s. c., 24 *North West.*, 563. (Unnecessary prayer for cancellation of deed.)

True vs. Triplett, 4 *Metc. (Ky.)*, 57.

First Nat. Bk. of Memphis vs. Kidd, 20 *Minn.*, 235. (Mere equity reducing or avoiding plaintiff's demand not a counterclaim needing reply.)

Barthet vs. Elias, 2 *Abb. N. C. (N. Y.)*, 364. (Answer setting up usury in bond and mortgage sued on, and praying they be cancelled, not a counterclaim, because purely defensive.)

s. p., *Equitable Life Ass. Soc. vs. Cuyler*, 75 *N. Y.*, 511; aff'g 12 *Hun*, 247.

Nichols vs. Boerum, 6 *Abb. Pr. (N. Y.)*, 290. (Recoupment not a counterclaim, because merely defensive.)

s. p., *Cockerill vs. Loonam*, 36 *Hun*, 353, n.; s. c., 20 *Weekly Dig.*, 545.

American Dock & Improvement Co. vs. Staley, 40 *N. Y. Super. Ct. (J. & S.)*, 539. (Set-off needs no reply, because purely defensive.)

§ 641. *Counterclaim not properly characterized in pleading it.*—If it is doubtful whether the substance of an answer is a counterclaim or merely defensive, it cannot, upon the trial, be held a counterclaim and admitted by failure to reply, unless the pleader has plainly character-

ized it on its face as such, so as to advise the adverse party of the necessity of a reply.

Broughton vs. Sherman, 21 *Minn.*, 431. (To constitute new matter set up in an answer a counterclaim, so as to require a reply, it must be pleaded as such.)

Equitable Life Ass. Soc. vs. Cuyler, 75 *N. Y.*, 511; aff'g 12 *Hun*, 247.

Avery vs. New York Central & H. R. R. Co., 6 *N. Y. Supp.*, 547; s. c., 24 *State Rep.*, 918. (Plaintiff may give evidence in avoidance of the new matter, so pleaded, without a reply. Citing *Acer vs. Hotchkiss*, 97 *N. Y.*, 395, 408; s. c., 20 *Weekly Dig.*, 452; *Assurance Soc. vs. Cuyler*, 75 *id.*, 511; aff'g 12 *Hun*, 247; *Arthur vs. Ins. Co.*, 78 *id.*, 462; *Keeler vs. Keeler*, 102 *id.*, 30; s. c., 23 *Weekly Dig.*, 437.)

McConihe vs. Hollister, 19 *Wisc.*, 269.

Gunn vs. Madigan, 28 *Wisc.*, 158. (Answer in an action upon a written guaranty alleging that the writing did not express the intention of the party, and was signed by mistake, and also showing what the true intention was, but not stating that such allegations are made as a counterclaim, nor demanding any further relief.)

Resch vs. Senn, 31 *Wisc.*, 138. (In action on a promissory note, answer alleging "for a further defence" facts showing that the note was fraudulently obtained, and demanding that the complaint be dismissed and the note be delivered up and cancelled.)

Stowell vs. Eldred, 39 *Wisc.*, 614.

As to ambiguous pleading, see also the following cases :

Acer vs. Hotchkiss, 97 *N. Y.*, 407; s. c., 20 *Weekly Dig.*, 452; *Van Brunt vs. Day*, 81 *N. Y.*, 251; s. c., 8 *Abb. N. C.*, 336 (Matter available alike as either, but not characterized in the pleading, *held*, good as a counterclaim if the objection to the evidence at the trial was not put on the defect in the pleading.)

Lancaster O. Mfg. Co. vs. Colgate, 12 *Ohio St.*, 344. (Where the same matter pleaded as a counterclaim also constitutes a defence, the defence will not be disregarded upon the trial for want of reply.)

Royce vs. Gibbons, 50 *Hun*, 341; s. c., 3 *N. Y. Supp.*, 106; 20 *State Rep.*, 9; *Green vs. Waite*, 33 *Hun*, 191; s. c., 19 *Weekly Dig.*, 436. (Where matter which may constitute either a counterclaim or a defence is pleaded as a defence without designating it either as a defence or a counterclaim, it will be treated as a defence merely.)

Alger vs. Vanderpoel, 34 *N. Y. Super. Ct. (J. & S.)*, 161. (Where no motion is made to compel an election, if it cannot avail as both, defendant is entitled to elect at the trial, even after he finds the fact unavailable in one aspect.)

McCown vs. McSween, 29 *S. C.*, 130. (An oral demurrer at the trial will not lie because the answer fails to separately state a counterclaim and a defence. The remedy for such defect should have been taken by motion to make more definite.)

Commercial Bank of Keokuk vs. Pfeiffer, 22 *Hum (N. Y.)*, 327, 337. (Where it was characterized in both ways, the remedy for doubt is by special motion.)

10. INCONSISTENCY IN A PLEADING.

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| <p>§ 642. Inconsistent allegations in same count or defence.</p> <p>643. Inconsistent allegations in separate causes of action.</p> <p>644. What is inconsistency.</p> <p>645. Confession by avoidance.</p> | <p>§ 646. Estoppel.</p> <p>647. Denial and separate admission, —plaintiffs must give proof.</p> <p>648. Inconsistent in fact.</p> <p>649. Amending to cure inconsistency.</p> |
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§ 642. *Inconsistent allegations in same count or defence.*—If one cause of action or one defence contains within itself allegations inconsistent with each other which cannot be harmonized as possibly both true in fact, by reasonable construction such as the adverse party would be bound to act on in preparing for trial, that one is to be given effect which is least favorable for the pleader; and the pleading and proof of the adverse party are sufficient if they meet that one, disregarding the other.¹

But nevertheless allegations either by a plaintiff² or defendant³ of two aspects or versions of the controversy, coupled with facts showing that upon either view he is entitled to prevail, may make a good issue as to both.

¹ *Marshall vs. Drawhorn*, 27 *Ga.*, 275. (Where a bill in equity contains inconsistent statements, it is enough

for the defendant to answer the weakest case stated against him.)

Mech. Sav. & Bldg. Loan Ass'n vs. O'Conner, 29 *Ohio St.*, 651, 655. (Action for purchase-money. One of the defences in the answer contained contradictory statements as to the existence and sale of one of the lots. *Held*, the existence and sale of the lot was admitted.)

Board of Education vs. Shaw, 15 *Kans.*, 33, 41.

s. p., *Fiske vs. Bailey*, 51 *N. Y.*, 150. (Allegation by plaintiff that defendant was the keeper of a public boarding-house. Defendant denied this, but added an allegation that plaintiff was unlawfully on defendant's premises. *Held* that defendant's title was admitted, and only the keeping of a public boarding-house was denied.)

In *Herman vs. Bencke*, 8 *N. Y. State Rep.*, 345, *N. Y. City Ct.*, an answer which alleged that the note was delivered "without value," and on "promises and considerations which have failed,"—*held*, a contradiction in terms, and no obstacle to directing judgment.

[If the question arose at the trial, the defendant ought to have been allowed to give evidence, or at least to amend.]

Otherwise perhaps of an inconsistency between a description of a party in the introductory clause, as a citizen of one State, and a direct allegation in the body of the declaration that at the times material to jurisdiction he was a citizen of a different State. *Bailey vs. Dozier*, 6 *How. (U. S.)*, 23; *s. c.*, 12 *Law. ed.*, 328.

* See §§ 99, 336, 416, *DEMURRER*, and note in 24 *Abb. N. C.*, 321.

* See § 460.

§ 643. *Inconsistent allegations in separate causes of action.*—Where a complaint contains several causes of action, an allegation in one of which is inconsistent with an allegation in the other, a defendant who without objection answers and goes to trial cannot object that the issue taken as to either cause of action is waived by the inconsistent allegation in the other.

[Whether this applies to a verified complaint, *query* ?]

Hall vs. Clement, 41 *N. H.*, 166 (1860). (*BELL*, C. J., says :

"An admission made in one count or plea has never

been held here to conclude the party upon any other plea.")

s. P., *Northern Pacific R. Co. vs. Paine*, 119 *U. S.*, 561.

s. P., *Starkweather vs. Kittle*, 17 *Wend.*, 20. (*Dictum* by BRONSON, J.: An admission in pleading is evidence against the party making it on the trial of the particular issue to which the admission relates; but an admission in one count of a declaration is not evidence against the plaintiff under any other count; and where the defendant pleads several pleas the plaintiff cannot use an admission in one plea for the purpose of establishing a fact which is denied in another (*Harington vs. Macmorris*, 5 *Taunt.*, 228). The Supreme Court of Massachusetts laid down a different rule in the action of slander (*Jackson vs. Stetson*, 15 *Mass. R.*, 48; *Alderman vs. French*, 1 *Pick.*, 1). These decisions have not been followed elsewhere (*Cilley vs. Janness*, 2 *N. Hamp. R.* 87, 89), and they are much shaken at home by the recent case of *Melvin vs. Whiting*, 13 *Pick.*, 184.

[So far as *Starkweather vs. Kittle* treats the allegation as not evidence, it is overruled by cases under the Code in application to pleadings brought home to the knowledge of the party.]

Berringer vs. Beecher, 58 *Mich.*, 557; s. c., 25 *North W. Rep.*, 491. (One count alleging wrongful discharge from employment in Nov. 1881; another alleging continuance to May, 1883. On the trial plaintiff gave no evidence of discharge, but testified he was not discharged, and early in the trial formally withdrew the first count, and was allowed to recover for wages, etc., under the second. *Held*, not error. MORSE, Ch. J., said that as he abandoned the special count at once, and it did not appear there had been any bill of particulars nor any surprise, the mere pleading of it did not estop him; though if he had given evidence under the special count and proceeded all through the trial until the case went to the jury, he could not then, at the last moment, have abandoned it and recovered under the common counts [citing *Wetmore vs. McDougall*, 32 *Mich.*, 276]. But the joining of two counts in a declaration, one of which is repugnant to the other, does not preclude a recovery upon one of them. They do not destroy and nullify each other [citing *Barton vs. Gray*, 48 *Mich.*, 164, 167; s. c., 12 *N. W. Rep.*, 30].)

§ 644. *What is inconsistency.*—In those jurisdictions

or cases where inconsistent defences cannot be pleaded, under the New Procedure a denial or allegation in one division of a pleading should not, for the purpose of determining what is in issue, be deemed inconsistent with a denial or allegation in another, unless such that it is impossible that both should be true as matter of fact. Inconsistency in legal theory or implication is not enough.

But a defence resting on a rescission of the contract sued on, or its invalidity, may be inconsistent with a defence or counterclaim in affirmance of it.²

Andrews vs. Hensler, 6 *Wall. (U. S.)*, 254. (Action on warranty of soundness. Denial of unsoundness, and allegation of notice to plaintiff to examine before delivery, and his neglect to do so, not inconsistent.)

Hopper vs. Hopper, 11 *Paige (N. Y.)*, 46. (The CHANCELLOR says: Where the defendant is required to swear to the truth of his answer, or at least to his belief of its truth, he cannot set up two distinct defences therein which are so inconsistent with each other that if the matters constituting one defence are truly stated, the matters upon which the other defence is attempted to be based must necessarily be untrue in point of fact. But the defendant may deny the allegations upon which the complainant's title to relief is founded, and may at the same time set up in his answer any other matters, not wholly inconsistent with such denial, as a distinct or separate defence to the claim for relief made by the bill, or to some part thereof.")

Followed in *Ledbetter vs. Ledbetter*, 88 *Mo.*, 60; s. c., 3 *West. Rep.*, 917.

Louisville & N. R. Co. vs. Hall, 87 *Ala.*, 708; s. c., 6 *South. Rep.*, 277; s. c., 4 *Law Rep. Anno.*, 710. (Negligence: denial, and allegation of contributory negligence on plaintiff's part. *Held*, that the latter was not an admission of defendant's negligence.)

Cole vs. Woodson, 32 *Kans.*, 272. (Slander: denial, and justification by truth, not inconsistent, for both may be true.)

First Nat. Bank vs. Lincoln, 36 *Minn.*, 132; s. c., 30 *North West. Rep.*, 449. (Action to recover for money alleged to have been diverted: allegation that the money had been paid to plaintiff not inconsistent with a general denial of plaintiff's right to receive it.)

Booth vs. Sherwood, 12 *Minn.*, 426. (Trespass: denial of

title, plea of license, in same answer, not an admission of title.)

Rhine vs. Montgomery, 50 *Mo.*, 566. (Denial of assault, and justification, not inconsistent.)

McCormick vs. Kaye, 41 *Mo. App.*, 263. (Trespass: denial, justification, and statute of limitations not inconsistent, because proof of one would not necessarily disprove the other. Reversed, for exclusion of evidence on the ground of inconsistency.)

Cohn vs. Lehman, 93 *Mo.*, 574; s. c., 12 *West. Rep.*, 315; s. c., 6 *South West.*, 267. (Action on injunction bond: denial, and plea that in the suit in which it was alleged to have been given appeal was still pending.)

McDonald vs. American Mortgage Co., 17 *Or.*, 626; s. c., 21 *Pac. Rep.*, 883. (Denial that services sued for were done on defendant's retainer, with allegation that they were done for an independent contractor. *Held*, that a defence alleging that plaintiff's negligence in the service caused defendant great damage was not inconsistent. Motion to strike out denied.)

s. p., *Pavey vs. Pavey*, 30 *Ohio St.*, 600. (Denial of making the note sued on, and allegation that there never was any consideration for the note. *Held*, error to require defendant to elect.)

Defences may be joined which can be verified by oath without swearing falsely.

[Citing also *Citizens' Bank vs. Closson*, 29 *Ohio St.*, 78; *Springer vs. Dwyer*, 50 *N. Y.*, 19; rev'g 58 *Barb.*, 189; *Buhler vs. Wentworth*, 17 *Barb.*, 649; *Mott vs. Burnett*, 2 *E. D. Smith*, 50; *Weston vs. Lumley*, 33 *Ind.*, 486; *Derby vs. Gallup*, 5 *Minn.*, 119.]

² *Adair vs. Adair*, 78 *Mo.*, 630. (Action to enforce vendor's contract security for the purchase of land not deeded. Answer admitted the agreement and contract of purchase, as stated, and denied all other matter; also pleaded the statute of frauds and the statute of limitations, also payments and demand of deed; concluding with a prayer for general relief equivalent to a prayer for compelling the vendor to complete the contract by delivery of the deed, if the fact of payment should warrant and entitle him to such a decree. *Held*, judgment for plaintiff was proper. Defendant cannot plead the statute of limitations, which would rescind the contract and leave the title in the plaintiff, and at the same time insist on having performed it on his part, which entitles him to a deed, and ask to have the title taken out of the plaintiff and vested in him by delivery of a deed. The facts alleged in his answer, along with his prayer

for relief, constitute a waiver of the plea of the statute. As separate defences, they do not consist.)

[*Breunich vs. Weselman*, 100 *N. Y.*, 609; s. c., 22 *Weekly Dig.*, 355. (Holding that an answer of usury and a tender of the amount actually loaned were inconsistent, seems hardly in line with the best considered authorities.)]

Compare *Bruce vs. Burr*, 67 *N. Y.*, 237, aff'g 5 *Daly*, 510. (Holding that in an action for breach of a contract of sale defendant may set up a rescission of the contract on the ground of fraud or mistake, and also a breach of warranty on the part of the plaintiff.)

§ 645. *Confession by avoidance*.—At Common Law a plea in avoidance must confess the charge, but an express confession is not necessary.¹ Confession is necessarily implied by law.

Under the New Procedure, it is the better opinion that an avoidance does not in itself confess the charge,² except where the allegations of the avoidance cannot be true as matter of fact unless the material fact of the charge is true. An avoidance without a denial is still a confession; not, however, because of the avoidance, but because of the want of a denial.³

¹ *Day vs. Mill-Owners' M. F. Ins. Co.*, 75 *Iowa*, 694. (Action on a policy of insurance. Answer of a special defence. The Court say: "Our Code does not change the requirements of the common law as to a plea in avoidance. [Citing *Anson vs. Dwight*, 18 *Iowa*, 241.] It must in effect and for the purposes of the plea confess that but for the matter pleaded in avoidance the cause of action or defence to which it applies would entitle the party pleading the same to succeed thereon. But this confession need not be in terms, but may be by implication. [Citing *Anson vs. Dwight*, 18 *Iowa*, 241; *Morgan vs. Hawkeye Ins. Co.*, 37 *Iowa*, 359.] It is sufficient if it 'give color' to the alleged right of the adverse party. [Citing *Steph. Pl.*, 202, 217; 1 *Chit. Pl.*, 525.] There being no denial here, there was an admission of the allegations of the answer." [Citing also *Rev. Code*, §§ 2665, 2667.]

Gillen vs. Riley, 27 *Neb.*, 158; s. c., 42 *North West. Rep.*, 1054. (Action for price of liquor: plea that plaintiff

was dealing in liquors without a license. *Held*, a confession of purchase; and proof of the account sued on was unnecessary.)

[*Contra*, Seymour vs. Bailey, 76 Ga., 338. (Holding that a justification admitting only part of the material allegations of the complaint was not enough.)]

* *Dictum* in Taylor vs. Richards, 9 Bosw. (N. Y.), 679. (Action for rent. Allegation in answer that *if* the contract was made, it was joint, etc., setting up defect of parties. MONELL, J., well said: "A defendant in order to avoid need not confess. He has a right to put the plaintiff to his proof, and is not to be shut out of his defence because the proof is strong enough to charge him. He has the right to say, 'I deny your alleged cause of action against me, but if you shall succeed in proving it, still I am not liable, because, etc.'")*

Glenn vs. Sumner, 132 U. S., 152. (Recognizing this principle in a case arising under the North Caro-

* For some time after the adoption of the Code the tradition that avoidance implied confession was followed. Many authorities are vitiated by this error. And even so intelligent a writer as Mr. Bliss says: "It is difficult to see how one can allege new facts showing a non-liability that do not suppose the existence of a liability but for such facts." But every practitioner knows that one who justly denies the original indebtedness may also justly rely on infancy at the time it was alleged to have been contracted, or a general release, payment, or accord and satisfaction, in the way of buying his peace, or on almost any other of the ordinary defences in avoidance.

To use a very homely illustration: The woman in the familiar anecdote might peradventure truly say: "I did not borrow the kettle; your boys brought it on to my premises. I returned it, finding it left there and supposing it was yours. And it never was yours, for I discovered afterwards that it was my own; and after a controversy about it we settled, and I paid you for surrendering it." The Common Law would refuse to allow the denial to be coupled with the return, or with the compromise, on the theory that any avoidance must confess. But it is clear that all these allegations may be true together, and the New Procedure does not commit the injustice of shutting out one defence because another might prove sufficient.

A friend has given me the following ruling in an unreported case as an illustration in support of the view of the law stated in the text: A. sued B. for goods sold and delivered. B. put in two defences, general denial and payment. The facts were these: A. was an undisclosed principal of C. B. had bought the goods from C. and had paid him for them. Suppose "inconsistent" defences were not allowed, see what injustice would have been done in this case. If B. had been compelled to elect which defence he would stand on, and had stood on the general denial, A. could have boldly and safely proved the sale of his goods by his agent C. B. could not disprove this, and would be beaten. If, on the other hand, he had stood on the defence of payment, admitting the sale, the burden of proof would be on him to show that C. was an agent of A. and that the goods he claimed he had paid C. for were the identical goods for which A. had sued him. To do this, he would have had to call as a witness A. or C. or some other person from the enemy's camp. But by interposing the "inconsistent" defences of denial and payment, he put the burden of proof where it belonged. A. could not prove his case without doing it through C.; the moment that appeared, proof of payment to C. without notice of the principal's rights was in B.'s own power. This was the way the trial went, and B. won the verdict, which of right he should have had.

lina Code, the provisions of which are similar to the New York Code, except that there is no such sanction of inconsistent defences, GRAY, J., said: "As held by Chief Justice Marshall, sitting in the Circuit Court for the District of North Carolina, where the law authorizes a defendant to plead several pleas, he may use such plea in his defence, and the admissions unavoidably contained in one cannot be used against him in another." [Citing *Whitaker vs. Freeman*, 1 *Dev. L. (N. C.)*, 270, 280. See also *Knight vs. McDouall*, 12 *Ad. & El.*, 438, 442; *Gould vs. Oliver*, 2 *Man. & Gr.*, 208, 234; s. c., 2 *Scott N. R.*, 241, 262.]

Del Valle vs. Navarro, 21 *Abb. N. C. (N. Y.)*, 136. (Citing *N. Y. Code Civ. Pro.*, § 514, and holding that an avoidance in a reply does not confess the counterclaim.)

Tobin vs. Western Mut. Aid Soc., 72 *Iowa*, 261; s. c., 33 *North West. Rep.*, 663. (Denial of default in payment, and separate defence of waiver of default by receiving subsequent payments. *Held*, not inconsistent, and that the denial did not make it error to submit the question of waiver to the jury.)

There are numerous authorities to the contrary, even as late as *Goodman vs. Robb*, 41 *Hum (N. Y.)*, 605.

But the rule as above stated must now be deemed established.

[*Contra*, also, *Meadows vs. Hawkeye Ins. Co.*, 62 *Iowa*, 387; s. c., 13 *Ins. L. J.*, 377. (*Dictum*, that matter in avoidance necessarily admits the allegations sought to be avoided, and even therefore when contained in a reply waives the statutory denial.)]

By recent statute in Minnesota, pleading a set-off or counterclaim can no longer be construed as an admission of the cause of action. *Trainor vs. Worman*, 34 *Minn.*, 237; s. c., 25 *N. W. Rep.*, 401.

* *Potter vs. Smith*, 70 *N. Y.*, 299. (Trespass: plea of license, but no sufficient denial of title. *Held*, that title was admitted. Otherwise in *Booth vs. Sherwood*, 12 *Minn.*, where title was denied.)

§ 646. — *estoppel*.—Pleading that the adversary is estopped from setting up a fact he has alleged, is not inconsistent with a denial of the fact.

Eikenberry vs. Edwards, 71 *Iowa*, 82; s. c., 32 *North West.*, 183. (Promissory note: defence forgery. *Held*, the matter pleaded by plaintiff in reply as an estoppel was not an admission that the signature was a forgery, and

did not change the issue as to the genuineness of defendant's signature.)

Dana vs. Bryant, 6 *Ill.* (1 *Gilm.*), 104. (Holding therefore that judgment on a trial of the issue of estoppel, adjudging that there was no estoppel, must not be final, but interlocutory, and leave the issue as to the fact to be tried. Judgment reversed for error in this respect.) [Contra, see *Pepper vs. Shepherd*, 4 *Mackey (D. C.)*, 269; s. c., 1 *Cent. Rep.*, 89. (Defence in equity that sale was void also that the sale made by the party, estopped him. The Court say: "It is impossible that they can aver in one breath that the sale was utterly void and nugatory, and in the same breath deny that he has any redress and any right to appeal to a court of equity to enforce his rights, it being admitted on all hands that his debt has not been paid and that he has received no benefit whatsoever from the sale thus made and thus assailed." Citing *Philadelphia, &c., R. R. Co. vs. Howard*, 13 *How. (U. S.)*, 307.)]

§ 647. *Denial, and separate admission—Plaintiff must give proof.*—If a fact is sufficiently denied in one division of the answer to put the plaintiff to its proof, he cannot treat the denial as waived, or proof dispensed with, by reason of even an express admission of the fact, contained in a separate defence introducing an avoidance.

Troy, etc., R. R. Co. vs. Kerr, 17 *Barb. (N. Y.)*, 581, 599. (Subscription to stock. Answer, general denial; also defence in avoidance that defendant had subscribed under specified circumstances relied on as an avoidance. Held, error to receive the subscription in evidence, against objection, as part of plaintiff's case, without proof of defendant's signature.)

Brinsmaid vs. Mayo, 9 *Vt.*, 31. (A former recovery by plaintiff, alleged as a defence in one plea, not necessarily an estoppel against a denial in another plea, of the title established by that recovery.)

Contra, *Hartwell vs. Page*, 14 *Wisc.*, 49.

Even after judgment in favor of a defendant upon his substantiating an allegation in avoidance, the implied admission of the cause of action which at common law is necessarily involved in a plea of avoidance is not an estoppel. *Remington Paper Co. vs. O'Dougherty*, 81 *N. Y.*, 474; modifying 16 *Hum.*, 594.

§ 648. *Defences inconsistent in fact.*—It is the better opinion that under the New Procedure, unless the statute excludes inconsistent defences, a plaintiff who has gone to trial without objection, on an answer different divisions in which cannot both be true, has not a right, for the purpose of determining what is in issue, to object that either part of the answer impairs the other.¹

But when the answer is verified, and on its face one defence is necessarily false, the Court has the power to compel election,² and to deal with the perjury.³

¹ *Goodwin vs. Wertheimer*, 99 *N. Y.*, 149. (Holding that under the *N. Y. Code*, from which the requirement that defence be consistent has been omitted, a denial of wrongful detention and refusal is not waived, and demand and refusal admitted, by a separate defence alleging title in defendant.)

Parks vs. McClellan, 44 *N. J. L.*, 552. (Under *N. J.* statute inconsistent and contradictory pleas allowed, introducing them with a fictitious allegation that they are pleaded by leave of Court; and then the Court may strike out if not a case for leave. The Court say: 'The statute was designed to relieve against the hardship of the common-law rules of pleading, which sought to narrow the controversy to a single issue for the convenience of trial, frequently in disparagement of the rights of parties, and has always been liberally construed. In general, a defendant will be allowed to plead in different pleas as many substantially different grounds of defence as may be thought necessary, though they appear to be contradictory and inconsistent; and the Court will deny leave only where the several pleas are clearly repugnant, or will create unjust delay or embarrassment in obtaining a trial.'")

Heinrichs vs. Terrell, 65 *Iowa*, 25. (Trespass on lands. Denial and plea of twenty years' ownership and possession, and a special defence as to boundary. *Held*, the defendant had a right to plead inconsistent defences. *Rev Code*, § 2710. Admissions in one defence are not to be construed as affecting a different and inconsistent defence. Citing *Barr vs. Hack*, 46 *Iowa*, 308. Defendant was entitled to the full benefit of each defence. The plaintiff, failing to show title in himself, was not entitled to recover. Therefore reversed.)

McLaren *vs.* Birdsong, 24 *Ga.*, 265. (The Court say: "Defendant must make his answer, which may contain as many several matters as the defendant may think necessary for his defence; and they may be inconsistent or contradictory.")

* The constitution requiring all pleas to be sworn, the Court may require defendant to elect between inconsistent pleas. Sanford *vs.* Cloud, 17 *Fla.*, 532.

* See form of the order in 1 *Abb. New Pr. & F.*, 297.

§ 649. *Amending to cure inconsistency.*—Where two defences are inconsistent, the Court has power to allow the defendant to amend at or after the trial by striking out either.

Breunich *vs.* Wechsel, 100 *N. Y.*, 609; s. c., 22 *Weekly Dig.*, 355; aff'g 49 *Super. Ct. (J. & S.)*, 31. (Holding it not error to allow this to be done to conform the answer to the proof; and that the admission which the defence struck out presented would still be available as evidence. FINCH J., says: "It was the right of the defendant to choose upon which of the defences she would rely, and having chosen, it was proper to conform the pleading to her proof.")

11. AIDER.

§ 650. Complaint aided by answer; answer by reply. § 654. Issues on separate causes of action.

651. Whole allegation or denial.

655. Denial of plaintiff's avoidance

652. Aider by immaterial or non-essential allegation.

of defence without pleading the defence.

653. Denial may aid omission to allege.

656. Complaint aided by reply.

§ 650. *Complaint aided by answer: answer, by reply.*—At Common Law,¹ in Equity,² and under the New Procedure³ the omission of an essential fact from the declaration or complaint is cured by an allegation⁴ or an express⁵ or implied⁶ admission of the fact in the plea or answer.

In the same way, the replication or reply will aid the answer.⁷

¹ See *United States vs. Morris*, 10 *Wheat. (U. S.)*, 246.

² *Cavender vs. Cavender*, 114 *U. S.*, 464; s. c., 29 *Law. ed.*, 212; s. c., 5 *Sup. Ct. Rep.*, 955.

[*Compare contra*, *Jackson vs. Ashton*, 11 *Pet. (U. S.)*, 229.

³ *Wall vs. Toomey*, 52 *Conn.* 35. (The benefit of what is called "express aider"—illustrated in *Vinal vs. Richardson*, 13 *Allen (Mass.)*, 521, 525; *Slack vs. Lyon*, 9 *Pick. (Mass.)*, 62; *Whittemore vs. Ware*, 101 *Mass.*, 352; *Erwin vs. Shaffer*, 9 *Ohio St.*, 43; and *White vs. Joy*, 13 *N. Y.*, 83,—viz., that an omission to state a material fact in a pleading may be supplied by the pleading of the opposite party,—rests on principles of justice, and is applicable under the theory of the new practice.)

Riggs vs. Maltby, 2 *Metc. (Ky.)*, 88. (Action on bond: facts constituting breach expressly admitted in defendant's answer.—*Held*, sufficient in the appellate court. [*Citing Fible vs. Caplinger*, 13 *B. Monr.*, 466.]

[*Contra*, *Doud vs. Wisconsin P. & S. Ry. Co.*, 65 *Wisc.*, 108; s. c., 25 *North W. Rep.*, 533. (Holding that to withstand a motion to dismiss at the trial, the complaint may be liberally construed; but it must be sufficient, independent of the answer.)]

⁴ *Limberg vs. Higenbotham*, 11 *Colo.*, 156.

Hedderly vs. Downs, 31 *Minn.*, 183; s. c., 17 *North West. Rep.*, 274; s. p., *McMahon vs. Herrick*, 33 *Minn.*, 262; s. c., 22 *North West. Rep.*, 543.

Dexter vs. Moodey, 36 *Minn.*, 205. (Action for services. The complaint alleged what the usual commission for such services were worth; the value of the property was \$21,000, and that the services were of the value of \$550. The answer denied that the services were of any greater value than the usual commission on \$4000. *Held*, that while the averment in the complaint as to the usual commissions was pleading evidential facts not essential to the cause of action, yet the defendant seemed to have intended to avail himself of it for the purpose of his defence, and this admission would stand in place of evidence of the value of the services. If, on the other hand, the denial was not to be considered an admission, the answer would not sufficiently deny that the services were of the value of \$550, so that on either aspect of the case the plaintiff could sustain recovery without proof of value.)

- Cohu vs. Husson*, 113 *N. Y.*, 662; s. c., 23 *State Rep.*, 505; aff'g 6 *State Rep.*, 292; 21 *North E. Rep.*, 703, aff'g 13 *Daly*, 334. (So held, sustaining refusal to dismiss the complaint at the trial for insufficiency.)
- Stedeker vs. Bernard*, 102 *N. Y.*, 329. (Allegation of firm note: answer that it was made by one partner,—who joined in the answer,—for his own purposes, etc. Held, plaintiff was entitled to judgment against such one upon this admission.)
- Miller vs. White*, 4 *Hun (N. Y.)*, 62; s. c., 6 *Supm. Ct. (T. & C.)*, 255. (Complaint to charge trustee of corporation with individual liability for its debt, omitting to allege nature of debt, supplied by description of it in the answer.)
- Bate vs. Graham*, 11 *N. Y.*, 237. (In an action by a judgment creditor against the administrator of the deceased debtor and an alleged fraudulent assignee of the debtor, the complaint failed to show the right of a judgment creditor to bring such an action directly, by omitting to allege that the administrator refused to regard the assignment as fraudulent. The answer of the administrator, however, denied that it was executed with fraudulent intent. Held, that the Court below properly refused to dismiss the complaint upon motion at the opening of the trial, and the appellate Court would deem the defect supplied by amendment, and sustain the judgment.)
- Leon vs. Bernheimer*, 10 *N. Y. Weekly Dig.*, 288. (Holding it error to dismiss complaint as insufficient when the insufficiency was supplied by the answer. The action was to recover money paid on an usurious discount; and the answer showed that the note was an accommodation note, made to be discounted.)
- White vs. Joy*, 13 *N. Y.*, 83, rev'g 11 *How. Pr.*, 36. (Complaint on note, not indicating that it had any payee. Answer, stating that defendants made and delivered it, and to whom,—held to cure the defect, although a demurrer would have been sustained; and it cured the defect even against the objection when raised on demurrer to reply.)
- Haddow vs. Lundy*, 59 *N. Y.*, 320, aff'g 3 *Supm. Ct. (T. & C.)*, 777. (Holding that an omission of the complaint to aver a necessary fact which appears by the answer, may be supplied, or treated as if supplied, even after appeal to the Court of Appeals.)
- Grimes vs. Hagood*, 19 *Tex.*, 246. (Answer cured defect which had been previously erroneously disregarded on demurrer.)

- s. p., *Lyon vs. Logan*, 68 *Tex.*, 521; s. c., 2 *Am. St. R.*, 511.
 * *Barnes vs. Jackson's admr.*, 85 *Ky.*, 407; s. c., 3 *South West. Rep.*, 601.
Powell vs. Hayes, 31 *La. Ann.*, 789.
Rollins vs. St. Paul Lumber Co., 21 *Minn.*, 5.
 * *Donaldson vs. County of Butler*, 98 *Mo.*, 163.
Garth vs. Caldwell, 72 *Mo.*, 622. (Replevin. Petition not alleging defendant's possession. Answer denying that defendant "wrongfully" detains, implies that he detains, and cures the omission.)
 * *United States vs. Morris*, 10 *Wheat*, 246, aff'g. 1 *Paine*, 209. (Holding that on demurrer to replication, the replication was aided by the plea.)

The rule that a defect in the complaint is supplied by an allegation in the answer, does not apply when the defect is objected to by motion to dismiss at the trial, and the allegation relied on exists only in a counterclaim, for the motion to dismiss is in no way founded on the counterclaim, but waives it so far as this action is concerned. *Rosentower vs. Stein*. McADAM, J. (not reported.)

§ 651 *Whole allegation or denial.* One claiming aider from his adversary's pleading must take the whole allegation or denial, not merely the part which helps, rejecting that which hurts him.

Scofield vs. Whitelegge, 49 *N. Y.*, 259, 262; s. c., 12 *Abb. Pr. N. S.*, 320.

§ 652. *Aider by immaterial or non-essential allegation.*—An allegation which aids the case made by the adversary's pleading is none the less effectual as an admission upon which the adversary may rely at the trial, by reason of its not being material to the case made by the pleader.

Andrews vs. Chadbourne, 19 *Barb. (N. Y.)*, 147. (Allegation in complaint by transferee of note that he acquired it on or about a date which was after maturity. *Held*, that defendant could rest on this in connection with evidence of his payment to the transferror; and that it was error to disregard the allegation on the ground that an alle-

gation as to time is immaterial, and that the legal presumption is that a note is transferred before maturity.)
 s. P., *People ex rel. Watkins vs. Perley*, 80 *N. Y.*, 624.
 (Here the allegation in the complaint admitted in the answer was unnecessary in the complaint, being stated in order to avoid an anticipated defence.)

§ 653. *by specific denial.*—The omission of an essential allegation from the complaint or answer is not cured by a denial of such fact in the answer or reply (as distinguished from a general denial), if objection be made at the opening of the trial.¹ Otherwise if no objection has been made until evidence is offered, in which case the denial if specific,² is to be regarded as forming an issue as if the fact denied had been duly alleged.³

¹ *Scofield vs. Whitelegge*, 49 *N. Y.*, 259; *aff'g* 12 *Abb. Pr. (N. S.)*, 320.

Tooker vs. Arnoux, 76 *N. Y.*, 397. (Judgment reversed for error in not dismissing.)

² In *Davis vs. Travis*, 98 *Mass.*, 222, under the *Mass. Prac. Act*, it was held that although the declaration failed to allege consideration, a *general* denial put upon plaintiff the burden of proving the consideration as if it had been alleged and specifically denied. Reversing judgment for error in not requiring proof from plaintiff, even though defendant declined an offer of leave to amend.

[The better opinion is that a general denial denies nothing more than is alleged, and that a denial must be specific to imply the absent allegation.]

³ *Slack vs. Lyon*, 9 *Pick. (Mass.)*, 62, 65. (Leading case. PARKER, J., says: "When the defendant chooses to understand the plaintiff's count to contain all the facts essential to his liability, and in his plea sets out and answers those which have been omitted in the count, so that the parties go to trial upon a full knowledge of the charge, and the record contains enough to show the Court that all the material facts were in issue, the defendant shall not tread back and trip up the heels of the plaintiff on a defect which he would seem thus purposely to have omitted to notice in the outset of the controversy.")

Worthley's Adm'r vs. Hammond, 13 *Bush (Ky.)*, 510.

(Not error to overrule a motion to exclude the testimony of a witness.)

Bentley vs. Bustard, 16 *B. Mon.*, 643. (Action for damages against owner of river boat for goods cast overboard. The answer showed that the loss was occasioned by one of the excepted causes. (*Held*, that it thus made a part of the issue the very fact which was omitted in the petition.)

Jewell vs. Mills, 3 *Bush (Ky.)*, 62. (Action on bond. Error to give judgment, instead of submitting the case to the jury.)

Louisville & Portland C. Co., vs. Murphy, *Adm'r*, 9 *id.*, 522; *Garth vs. Caldwell*, 72 *Mo.*, 622; *Hughes vs. Carson*, 90 *Mo.*, 399; s. c., 7 *West. Rep.*, 288.

Wagner vs. Missouri Pac. R. R. Co. (*Mo.*, 1889), 3 *Law R. Anno.*, 156, 159. (Here the complaint alleged that the deceased was on defendant's train, without alleging that he was a passenger, and the the answer alleged that he was not a passenger. *Held*, that as the parties had treated it as raising an issue, and gone to trial, and the fact which should have been alleged was proved, the defect in the complaint must be deemed waived.)

White vs. Spencer, 14 *N. Y.*, 247. (Action for flowing land. Plea of twenty years' possession, with no allegation to show it to be adverse. *Held*, that the plaintiff, having treated this allegation in the answer as a sufficient statement of a defence, by replying to it, and by going to trial without objection, was precluded from objecting to evidence to sustain it. *DENIO*, C. J., after reviewing several cases, said: "The doctrine established by these cases is, that a defective pleading, though the defect be one of substance, will not warrant the judge at the circuit in excluding evidence of the claim or defence thus imperfectly set up.")

Seeley vs. Engell, 13 *N. Y.*, 542. (Action on note, admitting part payment. Answer alleged that it was given for more than was due. *Held*, that if the allegation of mistake was too general, plaintiff should have moved before trial. "By omitting to do this, and especially by replying as though he understood what was intended to be set up, he was precluded from objecting to the evidence on the trial.")

Reck vs. Phoenix Ins. Co., 3 *Civ. Pro. R. (N. Y.)*, 376. (Action on marine policy. No allegation that loss was during the continuance of the policy; but denial thereof.)

§ 654. *Issues on separate causes of action.*—The

allegation of a party contained in the pleadings forming the issue as to one cause of action cannot aid his adversary to let in evidence under the issue upon another cause of action.

Reed vs. Inhabitants of Scituate, 89 *Mass.* (7 *Allen*), 141, 143. (Here the first count was on a special contract, and the second general. *Held*, that although an allegation in the first count showed that the action was premature, defendant could not avail himself of this as a defence to the second count. *Dictum* that perhaps it might have been otherwise had plaintiff himself proved the fact.)

§ 655. *Denial of plaintiff's avoidance of defence without pleading the defence.*—If, besides stating the cause of action, plaintiff alleges facts going to constitute a defence and adds an avoidance of that defence,—such, for instance, as a waiver,—he necessarily admits by implication the existence of those facts, and defendant under a denial of the matter in avoidance can avail himself of those facts as his defence without having himself pleaded them.

Vogel vs. People's Ins. Co., 75 *Mass.* (9 *Gray*), 23. (Action on fire policy, setting forth conditions, among which was a short limitation of time to sue; coupled with an allegation that this condition had been waived. *Held*, that denial of waiver, without alleging the condition, was sufficient to enable defendant to rely on the condition at the trial.)

§ 656. *Complaint aided by reply.*—The omission of the complaint to state a fact necessary to make out the cause of action intended, is cured by an allegation of the fact in the reply, if defendant accepts the reply and goes to trial without objection.

Raplee vs. Wilkin, 5 *N. Y. Weekly Dig.*, 560.
[*Contra*, *Webb vs. Bidwell*, 15 *Minn.*, 479.]

12. DEPARTURE.

§ 657. Refusal to try departure. § 658. Reply to counterclaim.

§ 657. *Refusal to try departure.*—Where a reply departs entirely from the complaint the Court may refuse to try the new cause of action set up by the reply, and confine the party to the original issue.¹

Allegations showing that defendant is estopped from setting up what his answer contains, is not a departure.²

¹ *Marder, Luse & Co. vs. Wright*, 70 *Iowa*, 42; *Lafever vs. Stone*, 55 *id.*, 49; *School District of Hastings vs. Caldwell, Hamilton & Co.*, 16 *Nebr.*, 68; *Savage vs. Aiken*, 21 *Nebr.*, 610; *Campbell vs. Mellen*, 61 *Wisc.*, 612; s. c., 21 *North West. Rep.*, 864.

² *Paxton Cattle Co. vs. First Nat'l Bank*, 21 *Nebr.*, 621; *Cobbey vs. Knapp*, 23 *id.*, 587.

§ 658. *Reply to counterclaim.*—A proper reply to a counterclaim avails for that purpose, notwithstanding it could not avail in support of the original cause of action, because as such it would be a departure.

Trainor vs. Worman, 33 *Minn.*, 484; s. c., 25 *North West. Rep.*, 401.

13. WAIVER BY PLEADING OR NOT PLEADING.

§ 659. Objections to be taken by demurrer or answer. § 660. Waiver of objection to counterclaim.

661. Abatement, and merits.

§ 659. *Objection to be taken by demurrer or answer.*—The provision in the Codes¹ that a demurrable objection (other than for insufficiency or want of jurisdiction of the subject [and except also absence of an indispensable

party²]), if not taken either by demurrer or answer, is waived,—means that when it appears on the face of the complaint it is waived³ if not taken by demurrer,⁴ and cannot be taken by answer;⁵ and that when it does not appear on the face of the complaint, it is waived if not taken by answer.⁶

It is the better opinion that an objection duly raised by demurrer is not waived by answering and going to trial after the demurrer has been overruled.⁷

¹ *Minnesota, Stats.* (Kelly), 1891, § 4770.

Missouri, Rev. Stats. (1889), § 2047.

New York, Code Civ. Pro., § 499.

² *Osterhoudt vs. Supervisors of Ulster*, 98 *N. Y.*, 239, 243; *s. c.*, 2 *Weekly Dig.*, 329.

Alexander vs. Horner (*U. S. C. Ct. Ark.*), 9 *Centr. L. J.*, 111.

As to who are within the rule, see § 445.

The proper time for this objection is after the opening and before going into evidence (*Lube Eq. Pl., Sumn. & W. ed.*, 109), or as soon as the fact appears by the evidence. The Court may dismiss, or let the cause stand over for amendment.

³ In *Fourth Natl. Bk. vs. Scott*, 31 *Hun*, 301, it is held that it appears on the face of the complaint if it appears by aid of an exhibit duly made part of the complaint.) [See §§ 11, 370, 396, 447. Also §§ 229, 241].

⁴ *McCormick vs. Blossom*, 40 *Iowa*, 256. (Defect of parties.)

Fulton vs. Loughlin, 118 *Ind.*, 286. (Under statute requiring assignors to be joined in certain cases, if plaintiff alleges that he is the owner of the note sued on by indorsement from the firm of which he is a member, the sufficiency of the indorsement can only be tested by a demurrer for defect of parties.)

Metcalfe vs. Brand, 86 *Ky.*, 331. (Defect of parties plaintiff.)

Sumner vs. Tuck, 10 *Mo. App.*, 269. (Misjoinder: so holding even though a demurrer could not have been sustained.)

Fosgale vs. Herkimer Co., 12 *N. Y.*, 580. (Misjoinder of parties.)

Blossom vs. Barrett, 37 *N. Y.*, 434. (Misjoinder of causes of action.)

Spooner vs. Delaware, etc. R. Co., 115 *N. Y.*, 22; s. c., 23 *State Rep.*, 554. (Defect of parties.)

⁵ *Zabriskie vs. Smith*, 13 *N. Y.*, 322.

⁶ *Davis vs. Chouteau*, 32 *Minn.*, 548, 550. (Non-joinder of a co-contractor as plaintiff.)

Tapley vs. Tapley, 10 *Minn.*, 448. (Married woman suing alone; the objection is to capacity, and waived if not taken by demurrer or answer.)

Compare Sheldon vs. Van Slyke, 16 *Barb.*, 26. (When persons jointly interested sue separately, defendant, notwithstanding he has omitted to plead the non-joinder of parties plaintiff, is entitled to an apportionment of the damages, so that each shall only recover his share.)

⁷ *Reynolds vs. Lincoln*, 71 *Cal.*, 183; s. c., 9 *Pacif. Rep.*, 176.

(Here the demurrer was for misjoinder of causes of action. The Court disapprove as unjust the contrary rulings in *Lonkey vs. Wells*, 16 *Nev.*, 271; *Hammersmith vs. Avery*, 18 *Nev.*, 225; s. c., 2 *Pac. Rep.*, 55; *De Boom vs. Priestly*, 1 *Cal.*, 206; *Pierce vs. Minturn*, *id.*, 470; *Brooks vs. Minturn*, *id.* 481; and say: "If a complaint improperly joins two causes of action, advantage must be taken of the defect by demurrer, or it is waived. Suppose a demurrer in such a case is interposed, and improperly overruled, a defendant thus situated may hesitate to rest upon his demurrer, lest an error of judgment on his part imperil his case and shut him out of a meritorious defence. If, however, he answers, he is under this rule forever precluded from availing himself of an error which may have worked him great injustice. It is proper to say that merely formal defects in a pleading are waived by pleading over after demurrer overruled; but as to those which affect the substantial rights of the parties, there is no inherent justice in holding a party to have waived error by pleading after a demurrer interposed by him has been overruled.

Wheelock vs. Lee, 74 *N. Y.*, 495; s. c., more fully, in 5 *Abb. N. C.*, 84.

[The rule varies in different States. See, *contra*, *Fordyce vs. Merrill*, 49 *Ark.*, 277; s. c., 5 *South West. Rep.*, 329; *Green vs. Taney*, 7 *Colo.*, 278; *Pence vs. Durbin*, 1 *Idaho N. S.*, 550. The true view seems to be that while the decision on the demurrer may be controlling on the trial court on the same question,—except perhaps when the objection is to jurisdiction of the subject,—yet the party has in all cases a right to reassert his objection, and have an exception which will raise the same question on appeal, and show that he has not acquiesced.]

[According to *Meniffee vs. Clark*, 35 *Ind.*, 304, raising an objection to an earlier pleading, on demurrer to a later pleading, is equivalent to having demurred specially to the earlier. But see § 461.]

§ 660. *Waiver of objection to counterclaim.*—Replying to an answer waives the objection that it did not expressly purport to set up a counterclaim.¹

But it does not waive the objection that the facts stated are not sufficient to constitute a cause of action.²

And it is the better opinion that it does not waive the objection to reception of evidence on the ground that the demand is not of a nature to avail as a counterclaim in the present action.³

Omitting to reply does not waive the objection that the matter alleged does not give a right of set-off or counterclaim.⁴

¹ *Nutter vs. Johnson*, 80 *Ky.*, 427; s. c., 4 *Ky. L. Rep.*, 305.

² *Talbott vs. Padgett*, 30 *S. C.*, 167. (A plaintiff may orally demur to a counterclaim, upon the ground that it is not sustained by facts stated after replying thereto.)

³ *Smith vs. Holt*, 67 *N. Y.*, 48.

Tracey vs. Grant, 137 *Mass.*, 181. (Set-off.)

Couch vs. Parker, 1 *Tex. App. Civ. Cas.*, § 436.

[*Contra*, *Roback vs. Powell*, 36 *Ind.*, 515; *Great Western Printing Co. vs. Tucker*, 73 *Iowa*, 755; *Lace vs. Fixen*, 39 *Minn.*, 46, and cas. cit. (In none of these cases was the objection attempted to be taken by objecting to evidence.) *Scheland vs. Erpelding*, 6 *Oreg.*, 258.]

⁴ *Jordan vs. National Shoe and Leather Bank*, 74 *N. Y.*, 467; s. c., 30 *Am. R.*, 319, aff'g 12 *Hum.*, 512. (Because that is a question of law.)

§ 661. *Abatement, and merits.*—Under the Common Law and Equity rule that a plea in abatement is waived by a plea to the merits,¹ it is not essential to move to strike out the waived plea before trial; but the objection may be taken at the trial.²

But notwithstanding such waiver, the Federal court,

under the statute requiring it to dismiss an action colorably brought, may direct an issue to be made and tried.³

[The usual provisions in the Codes allow both to be joined, and allow the Court to direct that one issue shall be tried before the other.]

¹ This rule applies in courts of the United States, even in Code States. *Cuthbert vs. Galloway*, 35 *Fed. Rep.*, 469, and *cas. cit.*

It applies notwithstanding defendant's plea to the merits expressly declares that he does not waive the other. *Sheppard vs. Graves*, 14 *How. (U. S.)*, 505.

² *Dictum* in *Oregonian Ry. Co. vs. Oregon Ry. & Nav. Co.*, 22 *Fed. Rep.*, 245, 248.

³ *Imperial Refining Co. vs. Wyman*, 38 *Fed. Rep.*, 574.

14. ISSUES BETWEEN CO-DEFENDANTS.

§ 662. Right to prove case against co-defendant.

663. Relevancy of claim to subject of action.

664. Same subject-matter.

§ 665. Unnecessary controversy.

666. Necessity of notice.

667. No responsive pleading necessary between co-defendants.

668. Unsuccessful defendant.

§ 662. *Right to prove case against a co-defendant.*—Where the answer of a defendant states facts showing that justice requires that a question between such defendant and a co-defendant be determined in order to determine the proper measure of relief to be granted to plaintiff, such defendant has a right, both in Equity and under the New Procedure, to require the determination of that question by demanding relief against the co-defendant and serving the answer upon him; and it is error to exclude evidence offered for that purpose under such an answer.

Albany City Sav'gs Inst. vs. Burdick, 87 *N. Y.*, 40, *rev'g* 20 *Hun*, 104. (Foreclosure: defendant asked reforma-

tion of an assumption clause fraudulently inserted in her deed by a co-defendant. *Held*, error to refuse to receive the evidence. *N. Y. Code Civ. Pro.*, § 521, confers no new power upon courts acting in equity, but is simply a regulation of practice.)

To same effect, *Derham vs. Lee*, 87 *N. Y.*, 599, aff'g 60 *How. Pr.*, 334. (Holding that when an adverse claimant for money sued for, has been made a party defendant, seeking to extinguish the hostile claim, the Court, having all the facts and all the parties before it, can adjust the rights not only between the plaintiff and the defendants, but between co-defendants, and can determine not only the amount due, but the party to whom it shall be paid.)

Otherwise where the matter of the question between the co-defendants is not capable of affecting the rights of the plaintiff, as where in foreclosure a defendant sets up an allegation of usury only available between himself and his co-defendant personally. *Kay vs. Whitaker*, 44 *N. Y.*, 565.

s. P., in admiralty, allowing a third person to be brought in for the purpose. *The Hudson*, 15 *Fed. Rep.*, 162.

It is not material which answer is served first. *Barnard vs. Onderdonk*, 11 *Abb. N. C.*, 349. (Affirmed on the merits in 98 *N. Y.*, 158.)

§ 663. *Relevancy of claim to subject of action.*—A defendant cannot claim to litigate, on the trial, a controversy with a co-defendant, though alleged in his answer with a demand of relief against the co-defendant, if the subject of controversy is not connected with the subject-matter of plaintiff's action.

Thus in a creditor's suit between grantor and grantee, to set aside the conveyance as fraudulent as against creditors, the grantor cannot demand that it be set aside on the distinct ground that the grantee induced him to execute it by deceit.

Rafferty vs. Williams, 34 *Hun*, 544. (Refusing on this ground to compel production of documents to sustain that claim.)

s. P., *Smith vs. Hilton*, 50 *Hun*, 236; *s. c.*, 19 *N. Y. State Rep.*, 340; 2 *N. Y. Supp.*, 820. (Holding, therefore,

that in an action by a legatee, under a will, to set aside certain conveyances by the testatrix in her lifetime as obtained by fraud, it was not permissible for a defendant to set up a claim that the will itself was obtained by fraud of such defendant, and was therefore invalid and void.)

§ 664. *Same subject-matter*.—The Court have power to determine a controversy between co-defendants although it does not affect the measure of relief to be granted to the plaintiff, if the claim is involved in the subject-matter of the action, and can be determined without unreasonable hindrance to the plaintiff's case.

Craig vs. Chandler, 5 *Colo.*, 543; s.c., 16 *Rep.*, 73. (Bill by one partner against the others for an accounting. *Held*, that a decree could be made between the co-defendants in favor of one who in her answer had alleged a balance to be due to her from her co-defendant, and prayed a decree therefor in her answer, although no cross-bill had been filed.)

Butler vs. Butler (*Chan. Div.*), 49 *L. J. Ch.*, 742. (Demand for contribution between trustees sued for breach of trust.)

Smart vs. Bement, 4 *Abb. Ct. App. Dec.*, 253. (Holding that defendants, who do not set up any equities as against plaintiff in a foreclosure suit, should not be allowed to litigate between themselves, before judgment, the question of their priorities of right in the fund or their equities as to the order of sale of parcels of the property, but plaintiff should have the usual judgment of sale. *WRIGHT, J.*, said: "When all the facts as between defendants on the record are before the Court, it may have power to determine issues and adjust equities between them; but it is not bound to do so, especially if there be any right of the plaintiff on the record which may be impaired or invaded.")

In Decker vs. Judson, 16 *N. Y.*, 439, 450, *DENIO, C. J.*, said that in a common-law action the Court is not bound to determine controversies between parties on the same side without allegations in the nature of pleadings between them.)

§ 665. *Unnecessary controversy*.—The Court is not bound to try a question between co-defendants if the

plaintiff's rights can be clearly and fairly determined without so doing.¹ But it should do so whenever it is necessary in order to do justice to defendant in determining plaintiff's case.²

¹ *Gaither vs. Clark*, 67 *Md.*, 18; s. c., 8 *Atl. Rep.*, 740. [Citing *Cottingham vs. Shrewsbury*, 3 *Hare*, 627.]

² *Albany Savings Bank vs. Burdick*, 87 *N. Y.*, 40, rev'g 20 *Hun*, 104, and holding it error in foreclosure to refuse to allow a defendant to prove a claim to have the mortgage reformed on account of fraud committed by a co-respondent in procuring its execution. Compare §§ 662, 663.

For cases on necessity of cross-bill, see *Howe vs. South Park Comrs.*, 119 *Ill.*, 101; s. c., 7 *North East. Rep.*, 333; *Brinkerhoff vs. Franklin*, 21 *N. J. Eq.*, 334; *Tucker vs. St. Louis Life Ins. Co.*, 63 *Mo.*, 588.

§ 666. *Necessity of notice.*—If an answer demanding relief against a co-defendant is not served on such co-defendant or his attorney, the Court should refuse to try the issues proposed by it, except on consent, or tacit waiver of the objection by going into the trial without objection.¹

The Court should refuse to entertain a demand of relief by a defendant against a co-defendant who has not appeared in the action.² It is not enough that the answer was served on the attorney of the co-defendants who had appeared.³

But the New York statute allows personal service on defendants who have not appeared.⁴

¹ *Edwards vs. Woodruff*, 90 *N. Y.*, 396, 401; s. c., 16 *Weekly Dig.*, 4. (Vacating judgment for error in this respect, not even notice of trial having been served on the co-defendant.)

² *Woodworth vs. Bellows*, 4 *How. Pr. (N. Y.)*, 24. (Sustaining plaintiff's motion to strike out.)
s. p., *Kay vs. Whittaker*, 44 *N. Y.*, 565.

³ *Parker vs. Commercial Tel. Co.*, 3 *N. Y. State Rep.*, 174.

⁴ *N. Y. Code Civ. Pro.*, § 521. The amendment of 1884

seems to have been overlooked in *Parker vs. Commercial Tel. Co.*, 3 *N. Y. State Rep.*, 174, to the contrary. In *Thode vs. Spofford*, 65 *Iowa*, 294; s. c., 17 *N. West. Rep.*, 561, a decree between co-defendants in a previous cause, where an infant was one of the co-defendants, was held to have no effect as an adjudication concluding against the subsequent litigation, on the ground that without such notice the Court had no jurisdiction. [Otherwise if the respective defendants each set up their adverse claims, and it does not appear that either did not have notice.]

s. P., *Joyce vs. Whitney*, 57 *Ind.*, 550.

In *Steel vs. Dixon* (*Chan. Div.*, 1880), 42 *Law Times R.*, *N. S.*, 765, where the co-defendant was not served with the statement of defence, but obtained a copy by applying and paying for it,—*held*, that the question was not at issue between the co-defendants.

§ 667. *No responsive pleading necessary between co-defendants.*—The failure of a co-defendant to deny allegations in the answer of another defendant served upon him for the purpose of trying a demand for relief as between them, is not an admission of the facts alleged against him in such answer.

Woodworth vs. Bellows, 4 *How. Pr. (N. Y.)*, 24. (But sustaining, nevertheless, plaintiff's motion to strike out.) In *Garnsey vs. Knights*, 1 *Supm. Ct. (T. & C.)*, 259 (*aff'd*, it seems, in 60 *N. Y.*, 646, but no opinion), it was held that a defendant, by not answering, admits the equities set up by his co-defendant who answers, so far, at least, that he cannot, after judgment against him by default, appeal from a judgment on those equities in favor of the co-defendant.

§ 668. *Unsuccessful defendant.*—A defendant who has failed in establishing any right to the fund in suit is not entitled further to contest the claims of co-defendants on that fund.

Spring vs. South Carolina Ins. Co., 8 *Wheat.*, 268. (Accounting in equity.)

II.—APPLICATIONS AT THE OPENING OF THE TRIAL.

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|-------------------------------------------------------------|---------------------------------------------------------|
| 1. OBJECTIONS TO THE JURISDICTION OF THE COURT, §§ 669-684. | FICIENCY, OR FOR JUDGMENT ON THE PLEADINGS, §§ 685-701. |
| 2. MOTIONS TO DISMISS FOR INSUF- | 3. MOTIONS TO COMPEL ELECTION, §§ 702-720. |

1. OBJECTIONS TO THE JURISDICTION OF THE COURT.

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| § 669. Several causes of action. | § 676. — residence, etc. |
| 670. Transitory action between non-residents. | 677. <i>Federal question</i> cases. |
| 671. Waiver — where plaintiff's pleading shows want of jurisdiction. | 678. — — particular classes of cases. |
| 672. Waiver by proceeding after objecting. | 679. <i>Citizenship</i> cases. |
| 673. Exclusive jurisdiction of another court. | 680. — Citizenship appearing in other parts of the record. |
| 674. Objection to service, by answer. | 681. — Parties collusively made or joined. |
| 675. — inferior court of local jurisdiction—service within limits. | 682. — Ranging parties to affect jurisdiction. |
| | 683. <i>Amending</i> to defeat objection. |
| | 684. — In United States courts. |

§ 669. *Several causes of action.*—If the Court has jurisdiction of any one of several causes of action stated in the complaint, others of which it has not jurisdiction may be disregarded as surplusage.

Allen *vs.* Wilmington & M. R. Co., 102 *N. C.*, 381; s. c., 9 *South East.*, 4.
s. p., Cook *vs.* Chase, 3 *Duer* (*N. Y.*), 643.

§ 670. *Transitory action between non-residents.*—A State court can, in its discretion, decline jurisdiction in a transitory action between non-residents.

Burdick vs. Freeman, 120 *N. Y.*, 420; s. c., 31 *State Rep.*, 427. (*Dictum*; holding that the Court may, in its discretion, entertain the action, and overruling, so far as to the contrary, *Molony vs. Dows*, 8 *Abb. Pr. (N. Y.)*, 316.)

Compare Cofrode vs. Gartner, 79 *Mich.*, 332; s. c., with note, in 30 *Centr. L. J.*, 434, to the effect that it ought not to decline jurisdiction if the parties are citizens of any of the United States.

§ 671. *Waiver*—where plaintiff's pleading shows want of jurisdiction.—A defendant, who has pleaded to the merits and gone to trial without objecting to the want of jurisdiction, does not thereby waive the objection that the subject appears by the plaintiff's pleading not to be within the jurisdiction of the court.¹

Such objection should be sustained, even though the answer or an agreed statement of facts, by admitting part to be due, reduces the controversy to what is within the jurisdiction.²

The reason is that the objection that the Court has no jurisdiction of the subject-matter is not waived by omitting to take it by answer or demurrer.

Mathie vs. McIntosh, 40 *Wisc.*, 120. (Trespass in a municipal court,—the premises being situated without the limits of the municipality,—dismissed on appeal in the Supreme Court, although no objection had been taken on the trial.)

Gamber vs. Holben, 5 *Mich.*, 331. (Statute directing Court to dismiss bill in certain cases, where the amount in controversy was less than \$100.)

Musselman's Appeal, 101 *Pa. St.*, 165. (The objection that the Court has no jurisdiction, by reason of defendant being a foreign executor, not having letters issued within the State where he is sued, goes to the subject of the action, and is not waived by not pleading it, but may be taken at any stage of the cause.)

s. p., *Gray vs. Ryle*, 5 *Civ. Pro. R. (N. Y.)*, 387.

s. p., *Hankinson vs. Page*, 3 *How. Pr. N. S.*, 323.

[*Contra*, *Rose vs. Thompson*, 17 *Ala.*, 628. (Action in justice's court for a sum exceeding \$50, and the objection not being raised until the case had gone to the jury.)]

² *Abney vs. Whitted*, 28 *La. Ann.*, 818.

Connors vs. Citizens' M. Ins. Co., 22 *La. Ann.*, 330, 331.

[It is the better opinion that the objection may be cured by amendment, if it has appeared by the evidence that the Court has jurisdiction. If defendant has pleaded, and gone to trial upon an amended complaint, which claims sufficient to give jurisdiction, he cannot defeat the action merely on the ground that the original complaint did not claim sufficient. *Washer vs. Bullitt County*, 110 *U. S.*, 558.]

§ 672. *Waiver by proceeding after objecting.*—It is the better opinion that if defendant has raised an objection to the jurisdiction in any proper way,—as by demurrer, or plea in abatement, or by motion to dismiss where that is allowable,—with special appearance, and the objection has been overruled, he does not waive it by pleading to the merits and going to trial,¹ even though the objection be founded only on a violation of the personal privilege of the defendant.² Nor does he waive such objection after taking it expressly in his answer, by serving a general appearance in the action.³

¹ [This is the rule of the appellate court. Whether the decision overruling the objection is conclusive in the trial court, is another question; but it cannot be conclusive on a question of jurisdiction of the subject.]

People vs. Central R. R. Co. of N. J., 42 *N. Y.*, 283. (Answering after overruling of demurrer.)

Harkness vs. Hyde, 98 *U. S.*, 476. (Suit for malicious attachment, in a District Court of Idaho. Service was had within the limits of an Indian Reservation. Defendant appeared specially and moved to dismiss, because of service without the jurisdiction. The motion was adjourned to the Territorial Supreme Court, and there overruled and exception taken, the case being remanded; whereupon defendant answered, and trial was had. *Held*, the service was illegal, and defendant did not waive the illegality by specially appearing to move to set it aside, nor by answering, upon his motion being overruled. He waives the objection only when he pleads to the merits, in the first instance.)

Compare with Blackburn vs. Selma, M. & M. R. Co., 2

Flippin, 525. (In a bill to foreclose a railroad mortgage, in a Federal Court, complainant, a non-resident, averred that defendant was duly chartered under the laws of the State where the suit was brought. Defendant appeared and demurred for want of jurisdiction, and upon the overruling of the demurrer, answered. *Held*, that under *U. S. Rev. Stat.*, § 737, the Court can acquire jurisdiction over the corporation by its voluntary appearance, and that the question of jurisdiction was waived by the filing of the answer, and perhaps by the demurrer. The only way to raise the question of jurisdiction was by plea in abatement, traversing the averment.)

¹ *Jones vs. Jones*, 108 *N. Y.*, 415; s. c., 13 *N. Y. State Rep.*, 833; 15 *North East. Rep.*, 709. (The Court say: "The principle upon which the doctrine proceeds is that the party who has objected to the jurisdiction, and whose objection has been overruled, is not bound, as was said by HARLAN, J., in *Steamship Co. vs. Tugman* (106 *U. S.*, 118; 1 *Sup. Ct. Rep.*, 58), 'to desert the case and leave the opposite party to take judgment by default.'" Citing *Harkness vs. Hyde*, 98 *U. S.*, 476; *Warren vs. Crane*, 50 *Mich.*, 300; 15 *N. W. Rep.*, 465; *Dewey vs. Greene*, 4 *Den.*, 93; *Walling vs. Beers*, 120 *Mass.*, 548; *People vs. Baker*, 76 *N. Y.*, 78; s. c., 32 *Am. Rep.*, 274, rev'g 15 *Hum.*, 256; *O'Dea vs. O'Dea*, 101 *id.*, 23; 4 *N. E. Rep.*, 110; *Cheever vs. Williamson*, 9 *Wall. (U. S.)*, 108; *Avery vs. Slack*, 17 *Wend. (N. Y.)*, 85.)

² *Wheelock vs. Lee*, 5 *Abb. N. C.*, 72; s. c., 74 *N. Y.*, 495. s. p., *Mathie vs. Mackintosh*, 40 *Wisc.*, 120. (Holding that the objection is never waived, but may be taken at any time.)

§ 673.—*Exclusive jurisdiction of another court.*—The objection that the cause of action¹ or a party² is one of which another court has exclusive jurisdiction, is not waived by failing to plead it and going to trial on other issues; for it is an entire want of jurisdiction of the subject.

¹ *Green vs. Creighton*, 10 *Smed. & M. (Miss.)*, 159; s. c., 48 *Am. Dec.*, 742. (Settlement of administrator's account in equity, where Probate Court is held to have exclusive jurisdiction.)

² *Callahan vs. Mayor, etc., of New York*, 66 *N. Y.*, 656,

aff'g 6 *Daly*, 230. (Where by statute exclusive jurisdiction is given to certain courts in all actions against a city, the appearance and answer of such city in an action in a court not specified by the statute is not a waiver of the question of jurisdiction, and does not confer jurisdiction.)

Mannhardt vs. Soderstrom, 1 *Binn. (Penn.)*, 138. (A State Court has no jurisdiction against a consul of another country; and whenever such defect in jurisdiction appears, the court will quash the proceedings, although the consul may have pleaded to the general issue.)

The objection that bail are sued in a court other than that where the original suit was (*Burtus vs. McCarthy*, 13 *Johns.*, 424), does not go to the jurisdiction; and should be taken, not by plea, but by motion. *Matthews vs. Cook*, 13 *Wend. (N. Y.)* 33.

So also where the original suit was in another State. *Otis vs. Wakeman*, 1 *Hill (N. Y.)*, 604.

§ 674. *Objection to service, by answer.*—It is the better opinion that even in a court of general jurisdiction, while an unqualified appearance waives all objection to jurisdiction founded on the mode or place of service of summons, such objections, not appearing on the face of the complaint, may be taken by answer, and are not, under the New Procedure, waived by being joined with defences on the merits.

[The real question is whether a defendant, whom it is attempted to subject to the jurisdiction by a false or unfounded allegation of service, must submit to have the fact determined on affidavits, or whether he has a right to examine witnesses, and, if the cause is one for a jury, to have the issue determined by them.]

Hamburger vs. Baker, 35 *Hun*, 455; s. c., 21 *N. Y. Weekly Dig.*, 213; *Jones vs. Jones*, 108 *N. Y.*, 415; s. c., 13 *N. Y. State Rep.*, 838.

[*Contra*, *Dailey vs. Kennedy*, 64 *Mich.*, 208; 31 *North West. Rep.*, 125. (Reviewing cases.)]

Ehriman vs. Teutonia Ins. Co., 1 *Fed. Rep.*, 471; s. c., 9 *Ins. L. J.*, 393.

§ 675. — *inferior court of local jurisdiction* — *Ser-*

vice within limits.—In an inferior court of local jurisdiction, the objection being founded on a statute allowing the court to take jurisdiction of certain subjects provided the defendant be served within the limits, the objection goes to the subject-matter, and not merely to the person,¹ and it may be taken by answer,² and a general appearance does not waive the answer.³

¹ *Wheelock vs. Lee*, 74 *N. Y.*, 495; s. c., 5 *Abb. N. C. (N. Y.)*, 72.

² *Sullivan vs. Frazee*, 4 *Robt. (N. Y.)*, 616.

³ *Wheelock vs. Lee*, above cited.

[The application of this rule in various States is very diverse, the statutes, and the view as to what is an inferior court, varying. Compare *Sims vs. Sims*, 50 *Ga.*, 572; *Wallace vs. Cox*, 71 *Ill.*, 548; *Chapell vs. Shuee*, 117 *Ind.*, 481; 20 *N. East.*, 417; *Meunch vs. Breitenbach*, 41 *Iowa*, 527; *Allen vs. Miller*, 11 *Ohio St.*, 374; *Keiser vs. Yandes*, 45 *Ind.*, 174; *Farmers' & M. Ins. Co. vs. Buckles*, 49 *Ill.*, 482; *Hardy vs. Adams*, 48 *Ill.*, 532; *Whitaker vs. Forbes*, 68 *N. Ca.*, 228; *Powers vs. Ames*, 9 *Minn.*, 178; *Young vs. Young*, 18 *Minn.*, 90.]

§ 676. — *residence, etc.*—The objection that a local court of limited jurisdiction has not jurisdiction by reason of the residence or place of business of a party, etc., if the jurisdictional facts are sufficiently alleged by the plaintiff, may be taken by answer.

And under the New Procedure the defence is not waived by being joined with a defence on the merits, nor by being accompanied by a general appearance.

Heenan vs. N. Y., West Shore, etc., R. Co., 34 *Hun (N. Y.)*, 602; aff'g 1 *How. Pr., N. S.*, 53; s. c., 6 *N. Y. Civ. Pro. R.*, 348.

§ 677. *Federal question cases.*—To give jurisdiction on the ground that the case is one arising under the Constitution and laws of the United States, it must affirm-

atively appear that some title, right, privilege, or immunity on which recovery depends will be defeated by some construction of the Constitution or law of the United States, or sustained by the opposite construction.¹

An allegation in the complaint that this is so, is not enough.² The record³ must state facts from which the court can see that the decision of the case necessarily⁴ depends upon such a question.⁵

If defendant has answered, the fact that plaintiff's complaint makes such a claim is not enough if the answer admits the complaint as to that ground, for no federal question remains to be determined.⁶

If a Federal question be shown to exist, the jurisdiction is not excluded by the fact that other questions are involved.⁷

¹ *Starin vs. New York*, 115 *U. S.*, 248.

² *Holland vs. Ryan* (*U. S. Cir. Ct. Dist. Colo.*), 17 *Fed. Rep.*, 1. (The complaint averred that the action involved the "construction and consideration of the laws of the United States upon the subject of mines and mining, and the validity and title to mining claims occurring or arising thereunder." *Held*, not sufficient to show a cause of action arising under the laws of the United States. The question arising under those laws and the difference of opinion between the parties as to the meaning and effect of the laws should be stated. Action dismissed on motion.)

Illinois Cent. R. Co. vs. Chi., B. & N. R. Co. (*U. S. Cir. Ct. N. D. Ill.*), 26 *Fed. Rep.*, 477. (Suit to enjoin a railway from further prosecution of condemnation proceedings to obtain a right of way. The bill averred that the plaintiff railroad company claiming under an act of Congress making the grant, its right of way was not subject to the State's right of eminent domain. *Held*, the mere assertion of the right was not of itself sufficient to confer jurisdiction. The Court must see from the facts and averments in the record that a Federal question was really and substantially involved. Bill dismissed on motion.)

Dowell vs. Griswold, 5 *Sawyer*. (*U. S. Cir. Ct.*), 39. (Holding also that it is not enough that a Federal question is incidentally involved.)

s. P., *Manhattan Ry. Co. vs. Mayor, etc., of City of New York*, 18 *Fed. Rep.*, 195. (Denying motion for injunction.)

³ *Gold Washing & Water Co. vs. Keyes*, 96 *U. S.*, 199, 203. (The Court say: "Before a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record by a statement of facts 'in legal and logical form,' such as is required in good pleading (1 *Chit. Pl.*, 213), that the suit is one which really and substantially involves a dispute or controversy as to a right which depends upon the construction, or effect of the Constitution or some law or treaty of the United States. If these facts do not appear by the pleadings, they must be shown in some form—as by a petition for removal.")

Railroad Co. vs. Mississippi, 102 *U. S.*, 135. (Holding that it is enough if it appears by the answer.)

⁴ *Levy vs. City of Shreveport (U. S. Cir. Ct. W. D. La.)*, 28 *Fed. Rep.*, 209. (The case must show a question that does arise, or will necessarily arise, under the Constitution or laws of the United States, and not one that may or may not arise. Plea to jurisdiction; suit dismissed.)

[*Compare Miller vs. Tobin*, 18 *Fed. Rep.* 609 (*U. S. Cir. Ct. D. Oreg.*), holding that where it appears from the pleadings of both parties that a Federal question is involved, a cause will not be remanded because of the insufficiency of the answer to raise an issue. The Court say: "As soon as the suit was commenced, and before there was any defence in the case, or it was known that there would be any, the right of removal attached, and continued until the time of filing the petition for removal expired. . . . So long as the answer does not expressly admit the plaintiff's cause of action, but makes or attempts to make a defence thereto, however unskillfully stated, or insufficient in law, the right of removal is not prejudiced thereby."]

⁵ See *Hartell vs. Tilghman*, 99 *U. S.*, 547.

⁶ *Stewart vs. McGruder (C. Ct. E. D. Va.)*, 11 *Wash. L. R.* 565.

§ 678.—*particular classes of cases.*—A suit by or against a *corporation* created by or under an act of Congress is one arising under the laws of the United States within the rule.¹ So of a suit on a marshal's bond.²

But a suit on a *judgment*³ recovered in a Federal court, or a defence⁴ founded on such a judgment, is not; nor is a suit founded on a *grant*⁵ made by Congress; unless the controversy presented by the pleadings in the cause necessarily involves such a question.

A suit involving a right founded on an act of Congress—such as a *patent* right—is not, if the answer admits that right, and the only controversy is upon some other question, such as the contract between the parties.⁶

¹ Union Pacific R. Co. *vs.* Myers (Pacific Railroad Removal Cases), 115 *U. S.*, 1.

² Feibelman *vs.* Packard, 109 *U. S.*, 421.

Bachrack *vs.* Norton, 132 *U. S.*, 337.

³ Provident Savings Life Assur. Soc. *vs.* Ford, 114 *U. S.*, 635.

⁴ Carson *vs.* Dunham, 121 *U. S.*, 421.

⁵ Illinois Cent. R. Co. *vs.* Chicago, B. & N. R. Co., 26 *Fed. Rep.*, 477.

s. p., *Exp. Smith*, 94 *U. S.*, 455.

⁶ Hartell *vs.* Tilghman, 99 *U. S.*, 547.

§ 679. *Citizenship cases.*—If the requisite citizenship to give jurisdiction does not appear by plaintiff's pleadings, or in some other part of the record, the objection that it does not exist may be raised at any stage of the proceedings.

Dodge *vs.* Perkins, 4 *Mas.* (*U. S. Cir. Ct.*), 435.

Grace *vs.* Am. Centr. Ins. Co., 109 *U. S.*, 278, and *Cas. Cit.*

§ 680. — *citizenship appearing in other parts of the record.*—The rule that citizenship need not necessarily be averred in the pleadings, if it otherwise affirmatively appears by the record, does not apply to papers improperly inserted in the transcript, and not constituting any legitimate part of the record.

Robertson *vs.* Cease, 97 *U. S.*, 646. (Judgment therefore reversed.)

§ 681. — *Parties collusively made or joined.*—Under the statute,¹ a party collusively and fraudulently joined for the purpose of giving the Court apparent jurisdiction should be disregarded, and the suit should be dismissed by the Court of its own motion.²

¹ Act of Cong. of 1875, c. 137 ; act of 1887, Mar. 3.

² *Farmington vs. Pillsbury*, 114 *U. S.*, 138, 144.

In *Raymond vs. Butterworth*, 139 *Mass.*, 471 s. c., 1 *North East. Rep.*, 126, in the State court, and not by force of any statute, it is said that such an objection must be pleaded by abatement; and *held*, that it cannot be first raised on error or appeal.

s. p., *Parsons vs. Denis* (*E. D. Mo.*, 1881), abstr. in 12 *Reporter*, 2.

§ 682. — *Ranging parties to affect jurisdiction.*—Jurisdiction cannot be conferred by the pleader ranging the parties on one or the other side for that purpose ; but the Court will look at the actual interests of the parties as disclosed by the pleadings, and consider them as ranged accordingly, for the purpose of determining the objection to the jurisdiction.

Bland vs. Fleeman, 29 *Fed. Rep.* (*U. S.*), 669. (Approved and followed on demurrer in *Bland vs. Freeman*, 17 *Wash. L. Rep.*, 410.)

§ 683. *Amending to defeat objection.*—If the facts were such at the commencement of the action that allegations of the necessary jurisdictional facts would not then have been true,¹ or a claim of an amount or the relief proper to give jurisdiction could not have been maintainable, then the Court cannot, by allowing amendment, gain jurisdiction without consent or waiver.²

But the Court may allow an amendment by adding jurisdictional allegations which would have been true if

made at the commencement of the action, or increasing the amount demanded, if the claim would not have been as matter of law unsustainable on the face of the pleading.³ Yet if the amount or relief was fixed by original process,⁴ or by actual service of the original pleading, the Court cannot take jurisdiction by amendment without notice to or appearance by defendant.

¹ *Cromwell vs. Cunningham*, 4 *Sandf. Ch. (N. Y.)*, 384. (A bill for foreclosure, against defendants not residing in the circuit where the action was commenced; no defence was made. *Held*, the bill could not be amended by adding a defendant who did reside within the circuit in order to give the Court jurisdiction.)

Charlotte Planing Mill vs. McNinch, 99 *N. C.*, 517. (The complaint in an action in the Superior Court against a husband and wife merely alleged a debt less than \$200, of which a justice of the peace had jurisdiction. Afterwards, by consent and order of Court, the complaint was amended by adding a second cause of action, in which it was alleged that the debt was chargeable on the wife's separate estate, and judgment was demanded that the debt be enforced by a sale of her real property if necessary. *Held*, that the Court properly refused to dismiss the complaint as to the second cause of action, although it had no jurisdiction over the first cause of action originally pleaded. It seems that the Court might have allowed the amendment without consent.)

² *Dwyer vs. Rathbone*, 17 *N. Y. St. Rep.*, 443; s. c., 2 *N. Y. Supp.*, 170. (In an action in the County Court the complaint stated that the plaintiff's services were reasonably worth \$1000 or thereabout and defendants had only paid \$500 or thereabout, and demanded that an account be taken and judgment be rendered for whatever sum found to be due. *Held*, that the Court below properly allowed the complaint to be amended so that the prayer for relief would read, "demands judgment for the sum of \$1000 or any less amount," etc. Under the liberal construction of the pleading required by the Code, the original complaint, although indefinite, was not to be construed as demanding more than \$1000. The effect of the amendment therefore, was merely to make the complaint more definite and certain. *McIntyre vs. Carriere*, 17 *Hun (N. Y.)*, 65, cited and approved.)

Johnston vs. Tippe, 33 *Fed. Rep.*, 530. (Where a bill for specific performance of a contract for the sale of land is silent respecting its value, except in the contract set forth the price is \$1000, an objection to the want of jurisdiction under the act of March 3, 1881, is obviated by an amendment to the bill alleging that the land is now worth \$3000.)

Grether vs. Klock, 39 *Conn.*, 133. (Where a bill of particulars, filed as a part of the record, reduces the sum claimed so as to deprive the Court of jurisdiction, nevertheless the Court may exercise control over the cause for the purpose of allowing such bill of particulars to be so amended, within a reasonable time, as to bring the matter in demand within the jurisdiction, if satisfied that it was drawn in its imperfect form by inadvertence of counsel or by mistake, and is not bound to dismiss the action. Judgment affirmed.)

Whitney vs. Sears, 16 *Vt.*, 587. (On an appeal from a justice's court the County Court permitted the plaintiff to raise the claim for damages in his writ from the justice's jurisdiction to \$1000. The defendant at a subsequent term moved to dismiss the suit for want of original jurisdiction in the justice. The plaintiff by leave of court reduced his claim to the original sum. *Held*, the County Court might allow the second amendment, and if it was made before any trial was had in the case: the jurisdiction was not affected by the first amendment.)

* *McIntyre vs. Carriere*, 17 *Hun (N. Y.)*, 65. (The County Court has no power to reduce amount claimed in summons where it exceeds \$1000, as it had no jurisdiction before the amendment. The Court here distinguishes *McDonald vs. Truesdail*, decided by it in Nov., 1876, where the summons was served without the complaint, and claimed no sum whatever. Under such conditions the complaint demanding damages in excess of the jurisdictional limit was properly allowed to be amended.)

§ 684.—*In United States Courts.*—The objection that plaintiff's pleading does not sufficiently allege citizenship to give jurisdiction may be cured by amendment at the trial.¹

But an amendment of the pleadings by setting up a

Federal question, in order to give the Federal court jurisdiction, will not be allowed in a doubtful case.²

¹ Kelsey vs. Penn. R. Co., 14 Blatch. (U. S. Ct.), 89.

² Rae vs. Grand Trunk R'y, 14 Fed. Rep., 401. (So held, when it appeared at the trial that the citizenship of the parties was insufficient. Action dismissed.)

2. MOTIONS TO DISMISS FOR INSUFFICIENCY, OR FOR JUDGMENT ON THE PLEADINGS.

A. Dismissal for insufficiency.

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| § 685. Defendant's motion to dismiss for insufficiency of complaint. | § 690. — Want of adequate remedy at law admitted. |
| 686. — Several defendants. | 691. — Objections to form, etc. |
| 687. — Answer not to be regarded. | 692. — Defences and counterclaims. |
| 688. — Amendment to defeat the motion. | 693. Pleading objected to liberally construed. |
| 689. — Exception to ruling. | 694. Overruling of a demurrer not conclusive. |

B. Motion for Judgment on the Pleadings.

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|--------------------------------------------|------------------------------------------------------------|
| § 695. Plaintiff's motion. | § 699. Denial and separate admission. |
| 696. Omission of essential fact. | 700. Defendant's motion for judgment for admitted defence. |
| 697. Immaterial issue. | 701. Defendant may move that plaintiff have judgment. |
| 698. New matter sufficient without denial. | |

A. Dismissal for insufficiency.

§ 685. *Defendant's motion to dismiss for insufficiency of complaint.*—The objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by going to trial without raising it by answer or demurrer, but it may be taken by motion at the trial.

Tooker *vs.* Arnoux, 76 *N. Y.*, 397, and *cas. cit.*; Pope *vs.* Terre Haute Car & Mfg. Co., 107 *id.*, 61.

s. p., Lyen *vs.* Bond, 3 *Wash. Ter.*, 407; s. c., 19 *Pacif. Rep.*, 35.

So *held*, even though the objection was set up improperly by the answer, instead of by demurring. Slack *vs.* Heath, 1 *Abb. Pr. (N. Y.)*, 331; s. c., 4 *E. D. Smith (N. Y.)*, 95; Russell *vs.* Mayor, etc., of N. Y., 1 *Daly (N. Y.)*, 263.

An allegation of the conclusion of law which the omitted fact was essential to make out was held not enough to save the complaint against such a motion, in Sheridan *vs.* Jackson (below cited).

Refusal is not reversible error if substantial justice is done by it. Clark *vs.* Crego, 51 *N. Y.*, 646, *aff'g* 47 *Barb. (N. Y.)*, 599.

At common law the trial court did not entertain discussions as to the sufficiency of the pleadings, but they were required to be determined by demurrer or motion before trial, or by motion in arrest after trial; and the only ground of nonsuit at the trial was that the proof was not sufficient to support the declaration. Safford *vs.* Stevens, 2 *Wend. (N. Y.)*, 158. Later cases, however, somewhat modified this rule. Gregory *vs.* Mack, 3 *Hill (N. Y.)*, 380; Boyd *vs.* Townsend, 4 *Hill (N. Y.)*, 183; Lutweller *vs.* Linnell, 12 *Barb. (N. Y.)*, 512.

§ 686.—*Several defendants.*—If the action is against more than one defendant, the objection may be made on behalf of any one or more of them, as to whom sufficient facts are not stated, and the complaint dismissed as to him or them.

Montgomery County Bank *vs.* Albany City Bank, 7 *N. Y.*, 459.

§ 687.—*Answer not to be regarded.*—On a motion to dismiss the complaint for not stating facts sufficient to constitute a cause of action, its averments must be taken as true,¹ and no reference to the answer is proper.²

An express denial in the answer, of a fact which plaintiff should have alleged to make out the cause of action intended, does not preclude dismissal of the com-

plaint for the failure of the plaintiff to allege it, if the motion to dismiss is made at the opening of the trial.³

¹ *Sheridan vs. Jackson*, 72 *N. Y.*, 170, aff'g 10 *Hun* (*N. Y.*), 89.

² *Smith vs. Van Ostrand*, 64 *N. Y.*, 278, rev'g, *Smith vs. Van Nostrand*, 3 *Hun* (*N. Y.*), 450; s. c., 5 *Supm. Ct. N. Y. (T. & C.)*, 664.

³ *Scofield vs. Whitelegge*, 49 *N. Y.*, 259; s. c., 12 *Abb. Pr. N. S.*, 320, aff'g 10 *Abb. Pr. N. S.*, 104; s. c., 33 *N. Y. Super. Ct. (J. & S.)*, 179. •

Tooker vs. Arnoux, 76 *N. Y.*, 397, 401.

Porter vs. Bank of Rutland, 19 *Vt.*, 410.

[*Contra*, of a general denial under the Massachusetts Practice Act. *Davis vs. Travis*, 98 *Mass.*, 222.]

After verdict the denial supplies the defect. *McFeely vs. Vantyle*, 2 *Ohio*, 197.

[For other cases, see *Limberg vs. Higenbotham*, 11 *Colo.*, 156; 17 *Pacif. Rep.* 481; *Smith vs. Theobald*, 86 *Ky.*, 141; 5 *South West. Rep.*, 394; *Donaldson vs. Butler Co.*, 98 *Mo.*, 163; s. c., 11 *South West. Rep.*, 572.]

Otherwise if the motion is not made till after evidence received.

[Whether the motion can be denied because the answer shows the matter which defendant objects has not been alleged, is disputed. Compare *Miller vs. White*, 4 *Hun* (*N. Y.*), 62; s. c., 6 *N. Y. Supm. Ct. (T. & C.)*, 255, and *Leon vs. Bernheimer*, 10 *N. Y. Weekly Dig.*, 288, on the one hand; and *Smith vs. Van Ostrand* (above), and *Russell vs. Mayor, etc.*, of *N. Y.*, 1 *Daly* (*N. Y.*), 263, on the other. Compare § 650, etc., AIDER.]

§ 688.—*Amendment to defeat the motion.*—The Court have power to allow the defect to be supplied by amendment to defeat the motion,¹ if the amendment does not substantially change the cause of action,² nor make the case one requiring a different mode of trial;³ but defendant should be allowed to amend also, to meet the new allegations,⁴ and an adjournment if surprised.

¹ *Woolsey vs. Trustees of Rondout*, 4 *Abb. Ct. App. Dec. N. Y.*, 639; *Simmons vs. Lyons*, 55 *N. Y.*, 671, aff'g 35 *N. Y. Super. Ct. (J. & S.)*, 554.

² Same cases.

³ *Bockes vs. Lansing*, 74 *N. Y.*, 437, aff'g 13 *Hun*, 38; *Stevens vs. Mayor, etc.*, of *N. Y.*, 84 *N. Y.*, 296.

⁴ See *Union Bank vs. Mott*, 11 *Abb. Pr. (N. Y.)*, 42.

§ 689.—*Exception to ruling.*—If the complaint is bad and not amendable, the motion, if made before the defect has been supplied by evidence, is not matter of discretion, but of legal right.¹

• If the defect is one proper for amendment, subsequent proof of the omitted fact cures error in denying the motion to dismiss.²

¹ *Tooker vs. Arnoux*, 76 *N. Y.*, 397; and see *Clift vs. Rodger*, 25 *Hun*, 39, 43.

Compare, however, *Clark vs. Crego*, 51 *N. Y.*, 646, aff'g 47 *Barb.*, 599.

² *Lounsbury vs. Purdy*, 18 *N. Y.*, 515; *Morton vs. Pinckney*, 8 *Bosw. (N. Y.)*, 135.

§ 690.—*Want of adequate remedy at law admitted.*—The existence of an adequate remedy at law is not available as a ground for dismissing the complaint at the trial for not stating facts sufficient to constitute a cause of action, if facts making a *prima facie* case of want of such remedy, are alleged in the complaint and not denied in the answer.

Town of Mentz vs. Cook, 108 *N. Y.*, 504. (Holding that the point is not made by objecting at the trial that the complaint did not state a cause of action; with *dictum* that it must be raised if at all by answer. The Court say: "The rule proceeds upon the basis that parties may by their mutual assent litigate their differences in a court of equity, where the assent of the defendant, if withheld, might induce the Court to refrain from the exercise of its jurisdiction. That jurisdiction existing over the general subject, the question of its exercise in the given case cannot be raised, unless the answer raises it.")

[For other and somewhat conflicting cases, see *De Bussierre vs. Holliday*, 4 *Abb. N. C. (N. Y.)*, 111; s. c.,

58 *How. Pr.*, 210; *Sherry vs. Smith*, 72 *Wisc.*, 339; s. c., 39 *North West. Rep.*, 556; *Graveley vs. Graveley*, 84 *Va.*, 145; 12 *Va. L. J.*, 377, and cas. cit.; *Atkinson vs. Orr*, 83 *Ga.*, 37.]

§ 691.—*Objections to form, etc.*—If the complaint states facts sufficient to constitute a cause of action, it cannot be dismissed at the trial for irrelevancy or redundancy¹ in its allegations, nor for indefiniteness or uncertainty which might have been corrected by motion,² nor for misjoinder³ or duplicity,⁴ nor for defect of parties,⁵ nor because plaintiff is not the real party in interest,⁶ or has not legal capacity to sue.⁷

¹ *Simmons vs. Eldridge*, 19 *Abb. Pr., N. Y.*, 296. [But irrelevant allegations should be disregarded. *Fox vs. Hunt*, 8 *How. Pr., N. Y.*, 12.]

² *Id.*

Hagenah vs. Geffert, 73 *Wisc.*, 636; s. c., 41 *North West. Rep.*, 967. A complaint will not be held bad on demurrer *ore tenus*, because the allegations are vague and indefinite, and might have been made more certain on motion.)

After answer, an objection that a petition does not state a cause of action is good only where there is a total failure to allege an essential matter, and is not good when the allegations are simply indefinite, or state only legal conclusions. *Laithe vs. McDonald*, 7 *Kan.*, 254; *Moody vs. Arthur*, 16 *Kan.*, 419.

³ *Ames vs. Harper*, 48 *Barb. (N. Y.)*, 56.

⁴ *Winterson vs. Eighth Av. R. Co.*, 2 *Hilt. (N. Y.)*, 389. (In equity a defendant cannot object at the trial for the first time to multifariousness; but the Court may object. *Oliver vs. Piatt*, 3 *How. U. S.*, 333.)

⁵ *Gen. Mut. Int. Co. vs. Benson*, 5 *Duer. (N. Y.)*, 168.

⁶ *Jackson vs. Whedon*, 1 *E. D. Smith*, 141; s. c., 3 *Code R.*, 186. *Compare Sheridan vs. Jackson*, 72 *N. Y.*, 170, 173, aff'g 10 *Hun*, 89.

⁷ *Palmer vs. Davis*, 28 *N. Y.*, 242; *Fulton Fire Ins. Co. vs. Baldwin*, 37 *id.*, 648.

[But objections to the jurisdiction of the subject-matter, as distinguished from objections to jurisdiction of the person, and objections to the absence of an indispen-

sable party, are not waived by omission to raise them by pleading.]

§ 692. — *Defences and counterclaims.*—If new matter constituting a defence is sufficiently alleged in the answer, the omission to take issue with the complaint is not ground for dismissal.¹

If new matter constituting a counterclaim is sufficiently pleaded, and plaintiff has taken issue thereon, the defendant's omission to take issue with the complaint is not ground for dismissal, but at most for finding in support of the cause of action, leaving the counterclaim to be tried.²

¹ *Newell vs. Doty*, 33 *N. Y.*, 83, 92.

² *Venable vs. Dutch*, 37 *Kans.*, 515 ; s. c., 15 *Pacif. Rep.*, 520.

§ 693. *Pleading objected to liberally construed.*—As against an objection to the sufficiency of allegations, first raised by a motion at the trial to dismiss, the pleading is to be more liberally construed to support it, than on a formal demurrer.

Hagenah vs. Geffert, 73 *Wisc.*, 636 ; s. c., 41 *North West Rep.*, 967. (Objection to complaint.)

s. p., *Williams vs. Ayrault*, 31 *Barb. (N. Y.)*, 364. (Complaint not to be dismissed if on a fair construction the facts are shown.)

s. p., *Smith vs. Smith*, 106 *Ind.*, 43 ; 5 *North East Rep.*, 411, 412.

Giles Lithographic, etc., Co. vs. Recamier Mfg. Co., 15 *N. Y. State Rep.*, 354, rev'g 12 *id.* 169. (Motion for judgment for frivolousness of answer. *Held*, that the answer should be supported to the fullest extent permitted by the law.)

Schweickhart vs. Stuewe, 71 *Wisc.*, 1. (Counterclaim.)

§ 694. *Overruling of a demurrer not conclusive.*—It is the better opinion that a motion to dismiss for insufficiency should not be denied merely because a demurrer

previously interposed on the same ground was overruled, if the demurrer was thereupon withdrawn,¹ nor because such a demurrer was sustained if the pleading demurred to was thereupon amended.²

The decision on the demurrer is conclusive on the trial court only where it was the decision of an appellate tribunal settling the law, for the trial court, and then is only conclusive as its decision on the same question would be even if raised in some other cause.

¹ See § 659, etc., *Waiver by pleading or not pleading*; and §§ 519, 520., *What pleadings form the issue*.

s. P., in Equity, *Garlick vs. Strong*, 3 *Paige* (N. Y.), 440; *Wright vs. Dame*, 1 *Metc.* (Mass.), 241; *Crease vs. Babcock*, 10 *id.*, 531.

[*Compare* *Borland vs. Haven*, (Cir. Ct. N. D. Cal.), 37 *Fed. Rep.*, 394, at law, to recover for moneys advanced. Holding that where a demurrer to a complaint is overruled, its sufficiency will not ordinarily be reconsidered at the trial.]

² *Calder vs. Haynes*, 7 *Allen* (Mass.), 387.

Post vs. Pearson, 108 *U. S.*, 418.

Ft. Dearborn Lodge vs. Klein, 115 *Ill.*, 177; 3 *North East. Rep.*, 272, 273. (Plea in trespass held good on demurrer, and plaintiffs replied. The trial court instructed the jury that the plea was no defence, but did not exclude from their consideration the evidence in reply. The appellate court say: "We do not think the course adopted was the proper practice. Nor do we agree with counsel for the appellant that where a court has made an order either sustaining or overruling a demurrer to a pleading, that such order passes beyond the control of the Court. On the contrary, whatever may have been the rule on the subject in former times when pleadings were *ore tenus*, we are of opinion that under the present liberal practice the Court has the power, and that it is its duty, at any time before trial, when it becomes satisfied that an erroneous ruling has been made with respect to the sufficiency of a pleading or other similar matter, to promptly set aside the order and correct the error. So, in the present case, when the trial judge became satisfied that the plea in question was bad, he should have withdrawn the case, at least temporarily, from the jury, set the order overruling the demurrer aside, and entered one sustain-

ing the demurrer. The defendant should then have been permitted to stand by the plea or plead over, as he might be advised. The course indicated is much the same as in the case of awarding a repleader. The fact that the order was made by another judge is a matter of no consequence whatever. The power of the trial judge was precisely the same as if he had made the ruling himself. The ruling in either case would be that of the Court.)

B. *Judgment on the Pleadings.*

§ 695. *Plaintiff's motion.*—It is the better opinion that under the New Procedure plaintiff may move at the opening of the trial for judgment on the pleadings;¹ and may do so as well on the ground that defendant has not attempted to take issue, or that the denials attempted by his answer are insufficient,² as that the new matter relied on by the answer is no defence.³

If the objection has not been raised before the trial, the pleading attacked is to be liberally construed to support it.⁴

But if there is one sufficient defence, plaintiff cannot have judgment because of the insufficiency of others.⁵

¹ *Horn vs. Volcano W. Co.*, 13 *Cal.*, 62.

Horn vs. Butler, 39 *Minn.*, 515; s. c., 40 *North West. Rep.*, 833.

Giles Lithographic Co. vs. Recamier Mfg. Co., 15 *N. Y. State Rep.*, 354; s. c., 14 *Daly*, 475, rev'g 12 *id.*, 169.

(VAN HOESSEN, J., said: "It was at one time held by the Court of Appeals (*Smith vs. Countryman*, 30 *N. Y.*, 665), that at the trial of an action it was not proper to grant a motion for judgment on the pleadings; and though a different view now prevails (*Schuyler vs. Smith*, 51 *N. Y.*, 309), it is a dangerous practice to allow either party to interpose an oral demurrer, at the trial, to the pleading of his adversary. If a pleading be substantially defective, the honest course is to demur to it, and thus give court and counsel a fair opportunity to ex-

amine and consider the question of law that is involved. If there be any reasonable doubt as to the insufficiency of the pleading, the Court should deny a motion that is sprung at the trial for judgment on the pleadings.")

s. P., *Eaton vs. Wells*, 82 *N. Y.*, 576, aff'g 22 *Hun*, 123.

s. P., *Grocers' Bank vs. Murphy*, 9 *Daly* (*N. Y.*), 510. (Holding that where the facts set up in the answer to an action on a promissory note would be inadmissible in evidence against plaintiff's objection, a motion for judgment for the plaintiff should be granted.)

The right to judgment on the pleadings rests on the right of plaintiff to recover without giving any evidence, and this he may do if there is no issue. *Bacon vs. Cropsey*, 7 *N. Y.*, 195.

[*Contra*, *Tevis vs. Hicks*, 41 *Cal.*, 123. (Holding insufficiency of denials waived by going to trial.)]

[Some of the authorities below cited may have been cases of special motion; but by the practice now established the principle is the same.]

* *Loveland vs. Garner*, 74 *Cal.*, 298, and cas. cit.

Horn vs. Butler (above cited).

Nolan vs. Skelly, 62 *How. Pr.* (*N. Y.*), 102; s. c., 13 *N. Y. Weekly Dig.*, 43.

Horn vs. Volcano, etc., Co. (above cited).

Doll vs. Good, 38 *Cal.*, 287. (Evasive denial, because a conjunctive denial of a conjunctive allegation. But leave to amend granted.)

* *Giles Lithographic, etc., Co. vs. Recamier Mfg. Co.*, 15 *N. Y. State Rep.*, 354; s. c., 14 *Daly*, 475, rev'g 12 *N. Y. State Rep.*, 169. (Frivolousness.) [*Contra*, *Green vs. Raymond*, 14 *N. Y. Weekly Dig.*, 322.]

Gaffney vs. St. Paul, M. & M. R. Co., 38 *Minn.*, 111; 35 *North West. Rep.*, 728. (Insufficient avoidance.)

s. P., *People vs. Northern R. R. Co.*, 53 *Barb.*, 98, aff'd in 42 *N. Y.*, 217.

* *McAllister vs. Welker*, 39 *Minn.*, 535; s. c., 41 *North West. Rep.*, 107.

Giles Lithographic Co. vs. Recamier Mfg. Co. (above cited).

* *Wilson vs. Madison, etc., R. Co.*, 18 *Ind.*, 226. ("One good defence is as good as many.")

s. P., *Nudd vs. Thompson*, 34 *Cal.*, 39. (Good denial is enough, though a defective special defence admits the cause of action.)

§ 696. *Omission of essential fact.*—The objection that

the pleading omits to allege an essential fact is not to be regarded as supplied by the presumption that the pleader intended to imply all incidental facts essential to sufficiency.

Gillette vs. Bullard, 20 *Wall.*, 571. (Action on a bond on appeal: plea, that the judgment had been suspended by a writ of error, omitted to aver that, at the commencement of the action, the appeal was pending, *Held*, that the liberal rule of the Codes did not aid the defect. Judgment on the pleadings affirmed.)

§ 697. *Immaterial issue*.—For the purpose of a motion for judgment on the pleadings, as well as for the purpose of a trial, an immaterial allegation may be disregarded, and a denial of such an allegation cannot prevent judgment.

Collis vs. Alburtis, 9 *N. Y. Civ. Pro. R.*, 80; s. c., 23 *N. Y. Weekly Dig.*, 281. (An allegation of demand in an action for rent due on a lease is not material, and need not be proved although denied.)
As to what is "immaterial," see § 536, and note.

§ 698. *New matter sufficient without denial*.—New matter in an answer which is sufficient to constitute a complete defence precludes granting a motion for judgment on the pleadings for lack of a denial of any allegations in the complaint, even though the complaint contains by anticipation allegations in avoidance of that defence.

This results from the rule in *Sands vs. St. John*, 36 *Barb.*, 628, 633; s. c., 23 *How Pr. (N. Y.)*, 140, and *Canfield vs. Tobias*, 21 *Cal.*, 349.

§ 699. *Denial and separate admission*.—If a complaint contains several causes of action,¹ or an answer contains a denial and one or more defences,² the fact of

inconsistency between them is not ground for granting judgment on the pleadings unless the inconsistency is such as to show bad faith.

¹ *Gillett vs. Borden*, 6 *Lans. (N. Y.)*, 219, and other cases cited under § 642, etc.

² *Amador County vs. Butterfield*, 51 *Cal.*, 526. (Action on official bond. Denial; and as a separate defence allegations that the plaintiff provided for defendant an office and a safe there to keep the money in, and that a stranger stole the money thence. *Held*, error to grant judgment on the pleadings. Judgment cannot be rendered on the pleadings on motion of the plaintiff if the answer contains a denial of the material allegations of the complaint, even if the answer sets up a special defence, separately stated, which admits the allegations denied.)

Rowland vs. Dalton, 36 *Miss.*, 702. (Here the inconsistency was between a special denial of partnership, and the general issue, which tacitly admitted a partnership. Judgment reversed for error in treating them as inconsistent on motion to strike out.)

Botto vs. Vandament, 67 *Cal.*, 332;; 7 *Pac. Rep.*, 753. (Where a general denial is coupled with another defence which consists of new matter in avoidance without an additional denial, the implied admission of the complaint supposed to result from setting up matter in avoidance does not impair the effect of the general denial in such sense as to allow judgment on the pleadings without trying the issue on the general denial.)

For other cases, see authorities under §§ 550–571, etc., as to admissions, and § 685 as to nonsuit.

§ 700. *Defendant's motion for judgment for admitted defence.*—Defendant may move at the trial for dismissal of complaint, on the ground that a defence is admitted on the pleadings.

He is not confined to a special motion, before trial, for judgment. *Bridge vs. Payson*, 5 *Sandf. (N. Y.)*, 210.

§ 701. *Defendant may move that plaintiff have judgment.*—A defendant who has answered not controverting

the complaint, nor setting up any defence or counter-claim, but asking that the relief which plaintiff has asked be granted, may move therefor, if there are no other defendants unrepresented nor objecting.

Havemeyer vs. Brooklyn Sugar Refining Co., 26 *Abb. N. C. (N. Y.)*, 157. (With note on the power of the Court to give the conduct of the cause to another than plaintiff.)

Bradford vs. Andrews, 20 *Ohio St.*, 208.

Such an answer, though unnecessary, cannot be stricken out at the trial. *Emigrant Industrial Sav. Bank vs. Clute*, 33 *Hun (N. Y.)*, 82, 87; s. c., 19 *N. Y. Weekly Dig.*, 332. (Foreclosure. The object of the answer here appears to have been to secure an award of costs.)

3. MOTION TO COMPEL ELECTION.

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|--------------------------------------------------------------------|---------------------------------------------------------------|
| § 702. Commingled or dissevered statement. | § 710. Legal ground, with equitable ground for same recovery. |
| 703. Demurrable misjoinder. | 711.— Common-law ground; with a statutory ground. |
| 704. Several counts for same recovery,—on contract. | 712.— Several statutory grounds. |
| 705. Contract; and judgment, award, or account—stated, thereon. | 713. Contract and tort. |
| 706. Conflicting versions of transaction or views of legal effect. | 714. Election to withdraw count. |
| 707. — torts. | 715. Formal allegation of identity. |
| 708. — inconsistency in fact. | 716. Different measure of damages. |
| 709. False warranty; and Damages for deceit. | 717. Considerations influencing discretion of the court. |
| | 718. Inherent authority of attorney. |
| | 719. Dismissal for refusal to elect. |
| | 720. Inconsistent defences. |

§ 702. *Commingled or dissevered statement*.—Neither a commingled statement as if a single cause of action, of facts constituting more than one cause,¹ nor a dissevered statement as if several causes, of facts constituting only one cause,² is ground for a motion to compel plaintiff to elect.

¹ *Craig vs. Cook*, 28 *Minn.*, 232.

² *Rinehart vs. Long*, 95 *Mo.*, 396.

[In case of a commingled statement, separation or election may be compelled on motion before answer, in many cases where election would not be compelled at the trial; for although a commingled statement of causes of action not allowing of identically the same defences may embarrass defendant in answering, yet if he has answered, he has waived that objection.]

§ 703. *Demurrable misjoinder*.—The objection to a misjoinder of causes of action, which would have sustained a demurrer, is waived by not demurring; and therefore not ground for compelling plaintiff to elect at the trial.¹

But the Court may nevertheless compel election if the causes of action are so inconsistent and repugnant as to embarrass justice.²

¹ *Woodman vs. Davis*, 32 *Kans.*, 344; 4 *Pacif. Rep.*, 262, 264. *Sherman vs. Inman S. S. Co.*, 26 *Hun (N. Y.)*, 107; *Van Loan vs. Willis*, 13 *Daly (N. Y.)*, 281; *N. Y. Code Civ. Pro.*, § 499. [And see *Gillett vs. Borden*, 6 *Lans. (N. Y.)*, 219.]

S. P., Connyere vs. Sioux City & P. R. Co., 78 *Iowa*, 410, s. c., 43 *North West. Rep.*, 267. (Commingled statement and misjoinder of allegations showing the killing of cattle through omission to fence, and through negligence, waived by answering and going to trial.)

² *Budd vs. Bingham*, 18 *Barb. (N. Y.)*, 494, 496. (Ejectment and trespass.)

Approved in *Cowenhoven vs. City of Brooklyn*, 38 *Barb. (N. Y.)*, 9, 11.

§ 704. *Several counts for same recovery,—on contract*.—Plaintiff should not be compelled to elect between several counts or causes of action not absolutely inconsistent with each other in any matter of fact, merely because each states only a separate ground for substantially the same recovery.¹

Thus plaintiff may state, in the form of separate causes of action, seeking only one recovery thereon, a promissory note and the original consideration;² an implied contract and an express contract supporting the

same claim;³ a count for an agreed price, and one for the fair value;⁴ a cause of action on a formal contract, and one on an oral agreement to the same effect.⁵ So of damages for the breach of a warranty, and an implied promise to repay the money the getting of which by fraud through the contract constitutes those damages.⁶

It is the better opinion that, upon the same principle, an original note and a renewal note may be pleaded as separate causes of action seeking one recovery.⁷

So also of repeated promises of the same thing if each be a sufficient cause of action;⁸ although if the promises were oral, or available as mere admissions, the better practice would be to make one count, sufficiently expressed in point of time to let all of them in.

¹ See the grounds of this principle stated at length in note in 24 *Abb. N. C.*, 326.

² *Kimball vs. Bryan*, 56 *Iowa*, 632; s. c., 10 *North West. Rep.*, 218. (Holding that in an action by the seller of personal property a count on an account therefor, and another on an order or draft given for the price, were not inconsistent.)

O'Conner vs. Hurley, 147 *Mass.*, 145; s. c., 16 *North East. Rep.*, 767. (*Dictum*. The Court say: "A plaintiff may, of course, bring an action upon the original cause, as for the purchase of goods, and also as an alternative, unite with it a count upon a note given for the goods. These are only different modes of stating what is in substance the same cause of action, intended to meet the evidence at the trial.")

Rhodes vs. Pray, 36 *Minn.*, 392; s. c., 32 *North West. Rep.*, 86. (Action on two due bills. Defendant's answer admitted non-payment, but alleged that they were memoranda of an oral contract, and non-performance of a condition precedent. Thereupon plaintiff amended by alleging as a separate cause of action a specific promise to pay an agreed price for the land which was the consideration of the notes, and as another separate cause of action a promise to pay the reasonable value of such lands. *Held*, proper to refuse to compel plaintiff to elect at the trial. The question is in the discretion of the trial court.)

Vibbard vs. Roderick, 51 *Barb. (N. Y.)*, 616, 628. (*An*

amendment at the trial of an action on a promissory note, by inserting a count on the original indebtedness which forms the consideration of the note, is proper, for this does not change "substantially the claim or defence.") [To the same effect is *Cramer vs. Lovejoy*, 41 *Hun* (N. Y.), 581, allowing, in an action on a note, amendment alleging the loan, and that the note was left as security.]

[In *Ferguson vs. Gilbert*, 16 *Ohio St.*, 88, this practice was disapproved.]

* *Packard vs. Reynolds*, 100 *Mass.*, 153. (Implied contract as to all the items of an account; and express contract with defendant's wife in his absence as to one of the same items.)

* *Wilson vs. Smith*, 61 *Cal.*, 209. (Services rendered.)

Longprey vs. Yates, 31 *Hun* (N. Y.), 432. (Services rendered. Here it appeared that the contract was made in part with defendant personally, and partly with a person claiming to be an agent. Held, that more than one count upon the same transaction might, in a proper case, be allowed under the Code. That if plaintiff should fail to prove the authority of the agent, they would be defeated, as to a portion of their claim, unless allowed to recover on the *quantum meruit*.)

Blank vs. Hartshorn, 37 *Hun* (N. Y.), 101; s. c., 22 *Weekly Dig.*, 44. (Holding on special motion before trial, that both were proper where it appeared necessary on account of danger of variance.)

s. p., *Ware vs. Reese*, 59 *Ga.*, 588. (On demurrer.)

s. p., *Stearns vs. Dubois*, 55 *Ind.*, 257.

Contra, *Gardner vs. Locke*, 2 *N. Y. Civ. Pro. R.*, 252. (On motion to make more definite and certain.) [Unsound. There is no inconsistency in alleging even that defendant promised to pay a specified sum, and that he also promised to pay the fair value. He may have made both promises, meaning the same thing; and if he did, it is only just to allow plaintiff to prove both; and, both may be alleged as one cause of action. *Goetz vs. Van Au*, 12 *Civ. Pro. R.*, 104.]

In *Wagner vs. Nagel*, 33 *Minn.*, 348; s. c., 23 *North West. Rep.*, 308 (action for services rendered), it was held that whether a motion to compel election should be granted was entirely within the sound discretion of the Court.

To same effect, *Rhodes vs. Pray*, 36 *Minn.*, 392; s. c., 32 *North West. Rep.*, 86.

American Dock and Imp. Co. vs. Staley, 40 *N. Y. Super. Ct. (J. & S.)*, 539. (Action to recover wharfage: refusal to compel election at the trial was sustained on

the ground that the motion should have been made before the cause was called for trial.)

In *Muzzy vs. Lellie*, 23 *Wisc.*, 445, compelling election was approved on the theory that the power of amendment made separate counts unnecessary. [This is sound in application to all cases where there is no such difference as to enable defendant to object to variance. If he is entitled to do so, he is also entitled to time to amend his answer, and it is for such cases that several counts are allowed.]

* *Velie vs. Newark Ins. Co.*, 12 *Abb. N. C.*, 309; s. c., 65 *How. Pr.*, 1; 3 *N. Y. Civ. Pro. R.*, 202; 2 *id.* (*McCarty*), 460. (Action to recover insurance money. One count stated that the company issued its policy against fire, and the other that by its agents it contracted to insure plaintiff against fire, and to issue its policy therefor. Motion to elect denied. WESTBROOK, J., said that where there are several distinct and separate lines of fact tending to give one relief, and where the Court can see that different averments are proper to meet an emergency of the trial, it is unjust to limit the pleader to any one of them. A jury, too, may be divided as to which set of facts is established, and at the same time unanimous as to the right of recovery. If, in such a case, election is compelled, justice may fail. A defendant may present as many defences as he may have, though apparently inconsistent, and no good reason is apparent why a plaintiff may not present as many statements of distinct lines of fact as he has, or suppose he has, giving him the right to one relief.)
[*Contra*, *Universal Life Ins. Co. vs. Devore*, 17 *Ins. L. J.*, 123.]

Brinkman vs. Hunter, 73 *Mo.*, 172. (Petition upon a written promise to pay a draft contained one count on the writing as an acceptance, and another on a breach of promise to accept. Motion to compel election denied.)

* *Murphy vs. McGraw*, 74 *Mich.*, 318; s. c., 41 *North West. Rep.*, 917. (A count in assumpsit for breach of warranty, and another for the recovery of money paid without consideration, which sets out that the property purchased was wholly worthless, and false representations of defendant which were relied upon.)

Freer vs. Denton, 61 *N. Y.*, 492. (Claim to recover money paid on contract rescinded for fraud, may be joined to one to recover the same for refusal to perform. The fraud in such case does not alter the fact that the cause of action is on the contract implied by law; and though the fraud be alleged in the same count with the

refusal, it need not be proved.) [But under *N. Y. Code Civ. Pro.*, § 549, the allegation, if not proved, must be struck out by amendment before judgment.]

* *Winsted Bank vs. Webb*, 39 *N. Y.*, 325, aff'g 46 *Barb.*, 177. (Holds that an action on notes, and renewal notes given by same defendant on surrender of the first is for but one and the same debt; and if plaintiff pleads both, he need not allege which he relies on; and if he admits that the renewal notes were usurious, he can recover on the cancelled ones; and it is error to nonsuit him on these facts. *WOODRUFF, J.*, says: "It is not essential that the plaintiff should determine by allegation whether it is by force of the first six notes, or by force of the second six, that he makes his claim. If, upon the whole transaction stated in the complaint, it is clear that the plaintiff is entitled to have of the defendants a sum of money specified, there is a cause of action.")

[*Contra*, where the complaint did not show that the renewal notes were due before the suit was commenced. *Supm. Ct.*, 1885, *Williams vs. McAllister*, 23 *Weekly Dig.*, 97. (And the Court add, that it is at least questionable whether anything short of a defence of usury interposed and maintained by defendant in an action on the second note would invalidate it so as to restore plaintiff's right of action on the first note, or the debt evidenced by it.)]

[*Contra*, also, seems *First Nat. Bk. of Covington vs. Gaines*, 87 *Ky.*, 597; s. c., 9 *South West. Rep.*, 396; 10 *Ky. L.*, 451.]

* *Walsh vs. Kattenburgh*, 8 *Minn.*, 127. Several promises to pay for services for which plaintiff sought to establish a statutory lien. Part of the promises were by defendant, part by defendant's assignor. *Held*, election should not be required.)

[*Contra*, of various forms of marriage promise, *Dunning vs. Thomas*, 11 *How. Pr. (N. Y.)*, 281.]

§ 705. — *Contract; and judgment, award, or account stated, thereon.*—It is the better opinion, that upon the same principle, a count or cause of action upon a judgment,¹ award,² or account stated,³ may be joined with a cause of action on the original consideration, and plaintiff cannot be required to elect.

[It is not inconsistent with this to hold that plaintiff cannot, by proving the judgment, etc., preclude defendant from giving evidence in defence to the cause of action on the original consideration.]

¹ *Krower vs. Reynolds*, 99 *N. Y.*, 245; s. c., 21 *Weekly Dig.*, 466, rev'g 19 *Weekly Dig.*, 383.

s. p., *Thompson vs. Minford*, 11 *How. Pr.* 273.

Teel vs. Yost, 56 *N. Y. Super. Ct. (J. & S.)*, 456; s. c., 22 *State Rep.*, 415; 5 *N. Y. Supp.*, 5.

² *Ladler vs. Olmstead*, 79 *Iowa*, 121.

³ *Munn vs. Cook*, 24 *Abb. N. C. (N. Y.)*, 314, and cases there collected.

Walters vs. Continental Ins. Co., 5 *Hun*, 343. (Suit on fire policy alleging also an award thereon. Motion to compel separate statement denied, because they were only one cause of action.)

Straus vs. Heyenga, 5 *N. Y. State Rep.*, 37. (Action for settlement of partnership affairs, alleging award had between the partners. The latter allegation being denied and unproven,—*held*, that plaintiff could recover on the contract alone.)

⁴ *Goings vs. Patten*, 1 *Daly. (N. Y.)*, 168; s. c., 17 *Abb. Pr.*, 339; 1 *Chitt. Pl.*, 16 *Am. ed.*, 373.

§ 706. *Conflicting versions of transaction, or views of legal effect.*—Upon the same principle, the plaintiff may state in separate counts the facts constituting his cause of action in a way to adapt it to conflicting theories of the legal effect of the transaction or of the relation of the parties.

Whitney vs. Chicago & N. W. R. R. Co., 27 *Wisc.*, 327. (Count charging a carrier as such, and count charging him as warehouseman.)

s. p., *Stearns vs. Dubois*, 55 *Ind.*, 257. (On demurrer.)

s. p., *Tarbell vs. Royal Exchange Shipping Co.*, 110 *N. Y.*, 170; s. c., 17 *N. Y. State Rep.*, 153. (Sustaining recovery because defendant was clearly one or the other, without deciding which.)

Blank vs. Hartshorn, 37 *Hun (N. Y.)*, 101; s. c., 22 *N. Y. Weekly Dig.*, 44. (Holding it error to compel plaintiff to elect between a claim by plaintiff as principal, with a claim by him as assignee of his agent, who had not disclosed the agency.)

Jones vs. Palmer, 1 *Abb. Pr. (N. Y.)*, 442. (Count charg-

ing a sale with a count charging agreement for exchange.)

Birdseye vs. Smith, 32 *Barb. (N. Y.)*, 217. (Count on a note given to a mutual insurance company as a stock note, with a count on the same note as a premium note. Sanctioned partly on the ground that plaintiff was a receiver.)

Mixer vs. Howarth, 21 *Pick. (Mass.)*, 205; s. c., 32 *Am. Dec.*, 256. (Claim for article sold and delivered; with count for work and materials in making it to order.)

⁶ **Cassidy vs. Daly**, 11 *N. Y. Weekly Dig.*, 222. (Count on the cause of action as accrued directly to plaintiff, and one on the same cause of action as derived by him by assignment from one who was his agent or servant.)

s. p., **Blank vs. Hartshorn** (above cited.)

§ 707. — *torts*.—Several methods or causes of the infliction of the same wrong may be joined; and whether stated as one cause of action or in several counts, plaintiff should not be required to elect.

Lancaster vs. Conn. Mutual Life Ins. Co., 92 *Mo.*, 460; s. c., 1 *Am. St. R.*, 739. (One count for injuries to plaintiff's building resulting from fall of a wall, alleged that defendant erected it so as to abut against a party-wall and did it so negligently as to cause the supports to give way, and the wall to fall on plaintiff's building. A second count alleged that defendant erected the wall in such a manner as to bear with great weight upon a girder which was negligently inserted in the party-wall, without providing sufficient supports therefor; and that he employed incompetent labor.)

Brown vs. Carbonate Bank of Leadville, 34 *Fed. Rep.*, 776. (Receiver's complaint alleged that defendant took securities from an officer of the bank with knowledge that he had surreptitiously taken them from its vaults; and in a second count alleged their transfer to defendant by the bank, in contemplation of insolvency, and to prevent their application according to law. Sustained on demurrer.)

White vs. Snell, 9 *Pick. (Mass.)*, 16. (Written promise to pay plaintiff specified sum, "to be paid if I recover of T. S. my demands against said S." *Held*, that a count alleging that there were such demands, but that diligence was never used to collect them, was not legally repugnant to a count that there never were such de-

mands. In either case plaintiff might recover; therefore the objection was not available after verdict, although it might have been ground for special demurrer.) *Brownell vs. Pacif. R. Co.*, 47 *Mo.*, 239. (Count alleging killing of deceased by negligence of defendant's employes, with count charging it directly to defendant.) *Kelly vs. Gould*, 2 *N. Y. Supp.*, 600. (Several distinct false representations, on either or all of which defendant would be liable for only one and the same loss.) *s. p.*, *Stubly vs. Beachboard*, 68 *Mich.* 401; *s. c.*, 36 *North West. Rep.*, 192; 13 *West. Rep.*, 71.

§ 708. — *inconsistency in fact.*—Absolute inconsistency in the conclusions of fact relied on respectively for two separate grounds for the same recovery, is not necessarily a reason for compelling election, if the inconsistency does not imply bad faith in the pleader; for he is entitled to recover if he can show that one or the other of two grounds must be true in fact, even though he cannot show conclusively which is true.

Gillett vs. Borden, 6 *Lans. (N. Y.)*, 219, 221. (Action on contract for lot of land; one count alleging mutual mistake in dimensions, and the other count alleging fraudulent insertion of an erroneous dimension, and both asking reformation. Motion to compel plaintiff to elect at trial denied, because even illegal misjoinder is waived by not demurring. If defendant waives election if he goes to trial in case of misjoinder, *a fortiori* it should be so in case of mere inconsistency of allegation. Plaintiff may give evidence under either allegation or both, and recover according to the fact.) *Everitt vs. Conklin*, 90 *N. Y.*, 645; *s. c.*, 15 *N. Y. Weekly Dig.*, 540. (Action for money paid on a note; allegation that the note was an accommodation note; coupled with an allegation that if it were not, but (as defendant claimed) were given for moneys due on a contract, the contract had been rescinded so that the note was in either case without consideration.)

§ 709. *False warranty; and Damages for Deceit.*—Upon the same principle, and within the same limits, a ground of recovery for false warranty, and a ground of

recovery for deceit by the false representations made in the sale, may be joined; for under either, practically the same fact would be in evidence.

Seymour *vs.* Lorillard, 51 *N. Y. Super. Ct. (J. & S.)*, 399. s. p., Murphy *vs.* McGraw, 74 *Mich.*, 318; s. c., 41 *North West. Rep.*, 917.

s. p., Bruce *vs.* Burr, 67 *N. Y.*, 237. (Defence of breach of warranty coupled with defence of deceit as a ground for rescission.)

§ 710. *Legal ground, with equitable ground for same recovery.*—Where legal principles and equitable principles entitle the plaintiff to the same substantial recovery or relief, although requiring proof of different facts, both grounds may be stated in the pleading, and plaintiff should not be required to elect.

Phillips *vs.* Gorham, 17 *N. Y.*, 270. (Ejectment, on allegation that defendant claimed under a pretended deed fraudulently obtained. Answer denying this, and alleging validity of deed. Reply that the grantor in said deed was of unsound mind, etc., and that it was obtained by threats and false promises. *Held*, proper to refuse to charge that plaintiff could not recover on proof of the imbecility and fraud as an equitable ground of relief. Plaintiff had a right to attack the deed under which defendant claimed title, both upon legal grounds and upon such as before the Code were of purely equitable cognizance. So far as substance is concerned, a complaint needs only to contain facts to constitute a cause of action recognizing no distinction of causes of action into legal or equitable.)

Scheu *vs.* N. Y., Lackawanna & W. R. Co., 12 *N. Y. State Rep.*, 99, and cas. cit. (Holding, in an action for injury to plaintiff's premises, that a complaint may be framed with a double aspect, joining a legal and an equitable cause of action arising out of the same transaction, so that the plaintiff, failing to establish one, may recover on the other.)

Weinberger *vs.* Merchants' Ins. Co., 41 *La. Ann.*, 31; s. c., 5 *So. Rep.*, 728. Petition prayed apparently that the policy sued on be reformed by striking out a printed

clause prohibiting the use of Texas and Mexican ports, or that judgment be given on the policy for the amount demanded. *Held*, proper to refuse to compel plaintiffs to elect whether they would proceed on the demand to reform or on the policy. There was no inconsistency in the prayers. If the allegations in a petition warrant equitable relief, and the right is shown, the Court will grant it.

[*Compare Oakville Co. vs. Double-pointed Tack Co.*, 105 *N. Y.*, 658; s. c., 7 *Centr. Rep.*, 720. (Action to reform contract for mistake. The trial court found on sufficient evidence as matter of fact that no mistake existed, the substantial purpose of the action being thereby defeated. *Held*, upon appeal, that plaintiff could not raise the further question of the construction of the contract, and insist that its true meaning is precisely what it would have been if the instrument were reformed as asked; that such a question was a purely legal one, and did not belong to the equitable action. No ground existed for the interposition of equity.)]

[It might have been otherwise if plaintiff had stated both causes of action in his complaint.]

As to alternative equitable relief, *compare Story's Eq. Pl.*, 39; *Redmond vs. Dana*, 3 *Bosw. (N. Y.)*, 615; *Wilkinson vs. Dobbie*, 12 *Blatchf.*, 298.

§ 711.—*Common-law ground; with a statutory ground.*

—It is the better opinion that upon the same principle a common-law ground of recovery may be joined with a ground of recovery upon a statute.

Chicago & Alton R. Co. vs. Dillon, 123 *Ill.* 570; s. c., 5 *Am. St.*, 559. (If place was not a highway, so as to entitle plaintiff to recover under the statute, the facts proved entitled him to recover at common law.)

Pearson vs. Milwaukee, etc., R. Co., 45 *Iowa*, 497. (Negligence at common law; and neglect to fence as required by statute.)

Haynes vs. Buffalo, etc., R. Co., 38 *Hun (N. Y.)*, 17. (Count on covenant to make farm crossings; and upon statute requiring them to be made.)

Durant vs. Gardner, 10 *Abb. Pr. (N. Y.)*, 445; s. c., 19 *How. Pr.*, 94. (Count against directors on official liability, and on liability as individuals.)

[*Contra, Moseley vs. Moss*, 6 *Gratt. (Va.)*, 534. (Cause of

action for defamation and cause of action under the statute for insulting language, not joinable.)]

[*Scott vs. Robards*, 67 *Mo.*, 289. (Action for refusal by trustee under deed of trust, to release the lands after payment of the notes, with claim also for a statutory penalty. *Held*, a misjoinder.)]

§ 712.—*Several statutory grounds*.—Whether the same principle applies to the case of several statutory grounds for the same recovery; and if so, how far, compare:

Affirmative.—*Barber Asphalt Paving Co. vs. Gogreve*, 41 *La Ann.* 251; s. c., 5 *So. Rep.*, 848. (Contractor's action for price of paving, relying on two statutes alternatively,—sustained.)

Crumbly vs. Bardon, 70 *Wisc.*, 385; s. c., 36 *N. West. Rep.*, 19. (Action for penalty for refusing to discharge mortgage. Demurrer on the ground that referring to a statute was a separate cause of action, overruled.)

Stockwell vs. United States, 3 *Cliff. (U. S. Cir. Ct.)*, 284. (Count for duties by reason of illegal importations, and count for double value for secretion of the goods. *Held*, not error to leave both to the jury, for the same plea and the same judgment would be proper; and wherever that is the case the counts may be joined.)

Bonnell vs. Wheeler, 16 *Abb. Pr. (N. S.)*, 81; s. c., 1 *Hun (N. Y.)*, 332 *aff'd* in 68 *N. Y.*, 294. (Count against defendants to charge them as trustees of corporation on two distinct grounds.)

State ex rel. Attorney-General vs. Milwaukee, L. S. & W. R. R. Co., 45 *Wisc.*, 579. (Several grounds of forfeiture joinable in *quo warranto*.)

Duncan vs. St. Louis, etc., R. Co., 91 *Mo.*, 67. (Several neglects to make fences, cattle-guards, gates, openings, etc.)

Negative.—*Armstrong vs. Wing*, 10 *Hun (N. Y.)*, 520. (Liability as heir at law not joinable with liability as next of kin in same count.) [Here, however, the grounds depend on different states of fact.]

Sipperly vs. Troy & Boston R. R. Co., 9 *How. Pr. (N. Y.)*, 83. (Count for obstructing highway and not restoring it, contrary to the general railroad act, not joinable with count for treble damages under another act.)

Wiles vs. Suydam, 64 *N. Y.*, 173; s. c., 3 *Hun*, 604, *rev'g* 6 *Supm. Ct. (T. & C.)*, 292. (Count against stockholder to charge him with individual liability for a debt of the

corporation by reason of failure in filing certificate of capital paid in, not joinable with a count against him as trustee, for failure to file an annual report.)

[*Contra*, *Richards vs. Kinsley*, 12 *N. Y. State Rep.*, 125.

(Denying motion to require such grounds to be separately stated, the Court being of opinion that they were but one cause of action. And to same effect, *Stearn vs. Herman*, 11 *Abb. Pr. N. S. (N. Y.)*, 376.]

§ 713. *Contract and tort*.—Where the same facts are both a breach of a contract and a tort, the plaintiff having stated them as two causes of action for the same recovery, should not be compelled to elect.

Haynes vs. Buffalo, etc., R. Co., 38 *Hun (N. Y.)*, 17.
(Count on covenant to make farm crossing, and upon statute requiring them to be made.)

To same effect, *P., C. & St. L. Ry. Co. vs. Hedges (Ohio)*, 11 *Week. L. Bul.*, 326.

s. p., *Sullivan vs. Fitzgerald*, 94 *Mass.* (12 *Allen*), 482.
(Count for money received, and count for deceit, joinable.)

s. p., *Whitbeck vs. Kehn*, 10 *Daly (N. Y.)*, 403. (Where the facts were stated as one cause of action.)

§ 714. *Election to withdraw count*.—If the complaint contains allegations of contract and of tort, plaintiff may be allowed to elect;¹ and it is not error to refuse to compel plaintiff to elect before giving any evidence.²

He may in the discretion of the Court be allowed to do so after giving his evidence.³

¹ *Stewart vs. Huntington*, *N. Y. Daily Reg.*, Dec. 9, 1884.
(Contract and conversion.)

² *Crafts vs. Belden*, 99 *Mass.*, 535. (Goods sold: count in tort and one in contract. Defendant moved that plaintiff be compelled to elect before introducing his evidence; motion refused. Plaintiff allowed to elect after introducing his evidence. Affirmed. The Court held that the joining of the two counts was permitted by the Practice Act (*Gen. Sts.* chap. 129, § 2, cl. 5), and that it was within the discretion of the judge to determine

at what stage plaintiff must elect. Citing *Sullivan vs. Fitzgerald*, 94 *Mass.* (12 *Allen*), 482.)
Teague vs. Irwin, 134 *Mass.*, 303. (Count in tort for deceit; and count on implied contract arising or rescission of contract for the same deceit.)

§ 715. *Formal allegation of identity.*—To justify joining several counts or causes of action as stating different grounds for the same recovery, a formal allegation that they relate to the same transaction is not essential,¹ if the Court can clearly infer from identity of details that they are the same.²

But it is proper to insert such a statement in each of the counts after the first.³ And this is necessary, as against demurrer for misjoinder, if the causes of action are such that they could not be joined in the same complaint, unless by reason of relating to the same subject of action or transaction.

But the Court will not presume that two causes of action are repetitious statements of the same transaction, and therefore compel plaintiff to elect, merely because it appears probable on the face of the pleading that they are.⁴

A mere general allegation that the two counts related to the same transaction is not sufficient if they obviously relate to different transactions.⁵

¹ *Griffin vs. Gilbert*, 28 *Conn.*, 493.

Pearson vs. Milwaukee, etc., R. R. Co., 45 *Iowa*, 497

² *Ford vs. Mattice*, 14 *How. Pr. (N. Y.)*, 91.

[*Contra*, *Carney vs. Bernheimer*, 3 *Month L. Bul.*, 22.]

³ It seems to have been held in *Summerville vs. Metcalf*, 15 *N. Y. Weekly Dig.*, 154, that if the correctness of a ruling depends on the fact that both counts relate to the same transaction, the fact that they do must appear on the record, and if not, the appellate court will treat the ruling as erroneous. In this case respondent claimed that the fact appeared from the opening statement of counsel.)

The Massachusetts practice under a statute expressly

allowing the joinder of separate counts for the same recovery, is to add such averment. *Cunningham vs. Hall*, 73 *Mass.* (7 *Gray*), 559.

⁴ *Smith vs. Douglass*, 15 *Abb. Pr.* (N. Y.), 266.

⁵ *Flynn vs. Bailey*, 50 *Barb.* (N. Y.), 73.

Under the old common-law practice of alleging, in fiction, that the second cause of action related to another subject, the later cases held that evidence was not admissible under both to support one and the same cause of action. *Holford vs. Dunnett*, 7 *M. & W.*, 348; *Deere vs. Ivey*, 12 *L. J. N. S.* (Q. B.), 132.

§ 716 *Different measure of damages.*—The fact that different counts stating, as separate causes of action, different grounds for the same recovery, call for a different measure of damages, is not alone sufficient ground for requiring plaintiff to elect; for the Court may give the proper instructions to the jury to assess the damages by a measure appropriate to the cause of action which they shall find to be established.

New Haven & Northampton Co. vs. Campbell, 128 *Mass.*, 104.

[The Massachusetts practice allows the joinder of a count in tort with a count on contract.]

Contra, *Clapp vs. Campbell*, 124 *Mass.*, 50.

§ 717. *Considerations influencing discretion of the Court.*—Chief among the considerations which may influence the discretion of the Court in determining an application to compel the plaintiff at the trial to elect between separate counts for the same recovery are the following:

Is the complaint capable of a construction that removes apparent inconsistency? ¹

Are the allegations of fact not absolutely inconsistent, so that the inconsistency is fairly reducible to different inferences, theories, or conclusions? ²

If not, does the inconsistency relate to a matter peculiarly within the knowledge of defendant, and one as to

which the plaintiff has a right to compel disclosure by him?³

Will substantially the same evidence be admissible under both allegations?⁴

Is the apparent inconsistency reducible to a concession, in one count, of a fact relied upon by defendant, the concession being made merely for the purpose of avoiding its effect by other allegations sufficient for that purpose?⁵

Are the causes of action such that they would not be joinable if relating to a different transaction, and could the defendant have effectually raised the objection by demurrer for misjoinder?⁶

Does the duplication of counts threaten to embarrass the trial of the issues or to confuse the jury?

Is there an inconsistency of fact so positive and irreconcilable that the proof necessary would be inconsistent and incongruous, and involve a contradiction repugnant to the due administration of justice?⁷

¹ *Ferguson vs. Gilbert*, 16 *Ohio St.*, 88, 91; *Trimble vs. Doty, id.*, 119, 129; *Supervisors, etc., vs. O'Malley*, 46 *Wisc.*, 35.

² See cases under §§ 708-711, above.

³ Such disclosure may now be had before pleading, for the purpose of enabling plaintiff to plead (1 *Abb. New Pr. & Forms*, 418-430); but as plaintiff cannot examine witnesses for the purpose of enabling him to plead, his right of discovery may not be adequate to dispense entirely.

As, for instance, where plaintiff may recover either on proof of mutual mistake, or of a mistake on his own part and fraud on the part of defendant, see *Gillett vs. Borden*, 6 *Lans. (N. Y.)*, 219, 221.

⁴ See *Seymour vs. Lorillard*, 51 *N. Y. Super. Ct. (J. & S.)*, 399; and cases cited in § above.

⁵ *Chatfield vs. Simonson*, 92 *N. Y.*, 209.

s. p., *Everitt vs. Conklin*, 90 *N. Y.*, 645; s. c., 15 *N. Y. Weekly Dig.*, 540.

⁶ The better opinion is, that counts whether in tort or on contract may be joined if it clearly appears that they

arose out of the same transaction. This is the express provision in Massachusetts.

⁷ *Budd vs. Bingham*, 18 *Barb.* (N. Y.), 494, 496.

§ 718. *Inherent authority of attorney.*—When an election between causes of action or recoveries is required at the trial, as for instance between recovering the price of goods or the possession of the goods, the attorney has authority to make an election which will bind his client.

Hart vs. Spalding, 1 *Cal.*, 213.

For other cases on the power of the attorney to bind his client, see 1 *Abbott's New Practice and Forms*, 409, 410, 450, 756.

§ 719. *Dismissal for refusal to elect.*—If the plaintiff refuses, when properly required by the Court to do so, to make election between two causes of action or two separate statements of the same cause of action, the Court may dismiss the complaint.

Mahaney vs. Fitzsimmons, *N. Y. City Ct.*, May, 1886, *N. Y. Daily Reg.*, Sept. 17, 1886.

§ 720. *Inconsistent defences.*—Where the statute allows a defendant to plead inconsistent defences he cannot be required to elect between them.¹

Even where the law allows only consistent defences to be pleaded, defences inconsistent in theory or reciprocally superseding each other may be pleaded if both may possibly be true in fact.²

¹ *Rigden vs. Jordan*, 81 *Ga.*, 668; s. c., 7 *South East. Rep.*, 857.

Horton vs. Banner, 6 *Bush (Ky.)*, 596. (Not guilty, and justification: held error to compel election.)

Bruce vs. Burr, 67 *N. Y.*, 237, aff'd 5 *Daly*, 510.

² See *Hopper vs. Hopper*, 11 *Paige (N. Y.)*, 46; *Havey vs. Pavey*, 30 *Ohio St.*, 602.

III.—RECEPTION OF EVIDENCE.

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|------------------------------------------------------------------------------------------|------------------------------------------------------------------------------|
| 1. WHAT KIND OF ALLEGATIONS ARE NECESSARY AND SUFFICIENT TO LET IN EVIDENCE, §§ 721-742. | CTIONS ON THE PLEADINGS, §§ 759-762. |
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1. WHAT KINDS OF ALLEGATIONS ARE NECESSARY AND SUFFICIENT TO LET IN EVIDENCE.

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| § 721. State practice in U. S. Court. | § 733. Generality of allegation of matter in pleader's knowledge. |
| 722. Excluding evidence because of insufficiency of complaint. | 734. Irrelevant allegation. |
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| 731. Judicial notice. | |
| 732. Several titles to same property. | |

§ 721. *State practice in U. S. Court.*—State practice as to allowing special matter to be given in evidence under a general allegation or notice is applicable in the U. S. Circuit and District Courts, sitting in the same State,¹ in civil causes, other than in equity, admiralty, and *in rem* for forfeiture; except where the Federal court has a con-

trary rule, and the State practice in question rests not on a statute or general rule of court, but only on unwritten usage.²

¹ *United States vs. Robeson*, 9 *Pet. (U. S.)*, 319; *U. S. R. S.*, § 914.

² See § 27, etc., p. 21 of this vol.

§ 722. *Excluding evidence because of insufficiency of complaint.*—The defendant may object that no evidence can be received if the complaint does not state facts sufficient to constitute a cause of action,¹ and the defect is not aided by the answer.

Plaintiff may in like manner object that no evidence can be received under an insufficient answer.²

The motion may be made before any evidence is heard.³

¹ *Rutland Probate Court vs. Hull*, 88 *Vt.*, 306; s. c., 2 *New Eng. Rep.*, 105. (ROYCE Ch. J., says: "A general demurrer is allowable at any time during the course of the trial, and a party is not bound to take one until he finds himself in peril from the judgment that may be rendered.")

s. p., *Curtis vs. Cutler*, 7 *Nebr.*, 315.

² *Specht vs. Allen*, 12 *Oreg.*, 117; s. c., 6 *Pacif. Rep.*, 494. s. p., *Lathrop vs. Godfrey*, 6 *N. Y. Supm. Ct. (T. & C.)*, 96; s. c., 3 *Hun*, 739.

³ *Perkins vs. Giles*, 53 *Barb. (N. Y.)*, 342. (It was made (and sustained on appeal) in *Sheridan vs. Jackson*, 72 *N. Y.*, 170, after admissions of fact had been made by plaintiff (10 *Hun*, 90); and in *Smith vs. Van Ostrand*, 64 *N. Y.*, 279, after some evidence had been given under the complaint, but none under the answer.)

The motion should be overruled if the defect is such as would be cured by verdict. *Spurlock vs. Missouri Pac. R. Co.*, 93 *Mo.*, 530; s. c., 6 *South West Rep.*, 349; s. c., 12 *West Rep.*, 347.

[In *Rowland vs. Superintendents of Poor*, 49 *Mich.*, 553; s. c., 14 *North West Rep.*, 494, it is said that the defect should be very clear, in order to justify such a practice.]

[The rules applicable are indicated in §§ 685-694, APPLICATIONS AT THE OPENING OF THE TRIAL.]

§ 723. *Essential fact not alleged*.—A fact essential to constitute the cause of action cannot be proved against objection if it is not alleged.

Bank of United States *vs.* Smith, 11 *Wheat.* (*U. S.*), 171 ; 6 *Law. ed.*, 443; *Story's Eq. Pl.*, 22.

Rector *vs.* Clark, 78 *N. Y.*, 21, 28. (An objection that a complaint does not state a cause of action may be available, even though the evidence is sufficient, provided the party properly makes the point when the evidence is offered, but for this purpose the defect must be pointed out by specific objection so that amendment might be made.)

Roth *vs.* Schloss, 6 *Barb.* (*N. Y.*), 308. (Action to recover back money paid in satisfaction of a judgment. Refusal of leave to insert omitted allegation that it was paid by mistake, etc., sustained.)

Hunt *vs.* Hudson River Fire Ins. Co., 2 *Duer* (*N. Y.*), 481. (Action on fire policy. Refusal of leave to strike out of answer an admission of liability, and insert an allegation of breach of condition, sustained.)

Garner *vs.* Hannah, 6 *Duer* (*N. Y.*), 262.

§ 724. *Defective allegation. Indefiniteness and uncertainty*.—Under the New Procedure, if a fact be alleged, the objection that it was defectively alleged does not avail when first interposed as a ground for excluding evidence at the trial.¹

Indefiniteness and uncertainty are not ground for holding a plea insufficient or excluding evidence, if the adverse party could not have been misled.²

¹ Johnson *vs.* Missouri Pacif. R. Co., 96 *Mo.*, 340; s. c., 9 *South West Rep.*, 790. (Such an objection can be interposed at the trial only when the petition fails altogether to state any cause of action, and not when the cause of action is only defectively stated.)

White *vs.* Spencer, 14 *N. Y.*, 247.

Seeley *vs.* Engell, 13 *N. Y.*, 542, 548; DENIO, J., citing *People vs. Ryder*, 12 *id.*, 433.

s. p., Haseltine *vs.* Simpson, 58 *Wis.*, 579; s. c., 17 *North West. Rep.*, 332, 334.

² So held even of a plea of usury, the Court saying that the usual rule for the construction of pleadings applies to an answer of usury; and that "plaintiff could not have been misled in respect to the defence intended, or as to the circumstances relied on to support it." *Lewis vs. Barton*, 106 *N.Y.*, 70; s. c., 12 *North East Rep.*, 437; 7 *Centr. Rep.*, 781.

§ 725. *Uncertainty as to theory.*—The objection that the complaint does not decisively indicate which of two theories plaintiff relies on for recovery on the facts stated, is not ground for excluding evidence.

Commercial Bank vs. Pfeiffer, 108 *N. Y.*, 242, 246; s. c., 13 *N. Y. State Rep.*, 506; 10 *Centr. Rep.*, 721. (Guaranty, or implied promise to account.)
s. p., *Thompson vs. Franks*, 37 *Pa. St.*, 327.
Mariner vs. Smith, 7 *Baxter (Tenn.)*, 423.

§ 726. *Hypothetical or contingent allegation.*—A direct allegation is none the less sufficient to admit evidence because hypothetically or contingently expressed,—as for instance in a complaint for money paid in paying an accommodation note; an allegation that if the note was not an accommodation note, the consideration had failed by the defendant's fault;¹ or as in an answer alleging that if it shall appear that the note sued on was made, it has been fully paid.²

If such allegation be objectionable, amendment may be allowed.³

¹ *Everett vs. Conklin*, 90 *N. Y.*, 645; s. c., 15 *N. Y. Weekly Dig.*, 540.

s. p., *McGrath vs. Hyde*, 81 *Cal.*, 38; s. c., 22 *Pacif. Rep.*, 293. (An allegation in a complaint to cancel a deed, that if the said M. ever signed or acknowledged said instrument he was forced and unduly influenced to do so by the defendant, and had not then or at any time since . . . sufficient strength of mind or body to execute or deliver said deed or to understand its provisions or covenants, and the said deed never was de-

livered by said M. to defendant,—is an allegation of non-delivery, and put in issue by a denial.)

[*Compare De Caumont vs. Morgan*, 21 *N. Y. Weekly Dig.*, 357; s. c., in full, *N. Y. Daily Reg.*, June 30, 1885. (Holding that a legatee's complaint against a transferee of assets, alleging ignorance as to whether the transfer was before or after the testator's death, but that if before, it "must have been" procured by undue influence,—bad, for lack of any direct allegation. [This was not an allegation of fact, but a mere conclusion, and with nothing to support it.])]

[*Compare also Jamison vs. King*, 50 *Cal.*, 132: (Complaint by administrator for possession of life policy, alleging that if delivered by the intestate in his lifetime, it was without consideration; and if not, the indorsement was intended as a will,—bad on demurrer. See *Cal. Code.*)]

Citizens' Nat. Bk. vs. Cincinnati, N. O. & Tex. R. R. Co., 9 *Cinc. L. Bul.*, 355. (Superior Court of Cincinnati. A well-considered case. Here plaintiff alleged that being about to take a transfer of stock in a corporation, he asked the president of the company if the shares were good; he said they were, and thereupon plaintiff purchased them. But the company subsequently denied their validity, and refused to issue a certificate. The pleader appears to have been unable to determine whether the stock was in fact valid or not; but it appearing to him that if it were valid, the corporation was a wrongdoer in refusing to issue a certificate, and if it were void the corporation was a wrongdoer in the deceit it practised by its officer, he put the dilemma in his complaint by alleging the representation, and the purchase on the faith of it, and the refusal, and thereupon demanded judgment as for conversion; and he then restated "as a second cause of action" the facts already once stated, adding that if the shares were void, defendant, by its officer, deceived plaintiff, and thereupon asked judgment for damages for the deceit.)

The Court, reviewing the practice in New York and other States, *held*, that the former rule in chancery—that a plaintiff, uncertain as to the form in which his ground of action would be established, could state it in the alternative—is still in force. See § . DEMURRER.

² *Swett vs. Southworth*, 125 *Mass.*, 417.

S. P., Prentiss vs. Brewer, 17 *Wisc.*, 635. (Ejectment: both parties claiming under a common grantor of respective so-called "halves" of an irregularly shaped quarter section. Defendant's answer alleged that it

was the intention of the parties to the deed under which he claimed, to convey thereby half the area, and if the deed did not have that effect defendant prayed that it be reformed. *Held*, reversible error to exclude evidence to sustain this, for since the adoption of the Code a defendant may avail himself of any defence, legal or equitable. COLES, J., said: "If any equities exist which show that the respondent ought not to recover on his legal title, they are available to protect the applicant in his possession." Citing *Fisher vs. Moolick*, 13 *Wisc.*, 321.)

* Case *vs. Pharis*, 106 *N. Y.*, 114, 118.

§ 727. *Notice of intent to prove.*—A statement that such and such facts will appear, or will be proved, or the like, is not equivalent to an allegation, and will not let in evidence, except where such notice is expressly authorized by statute.

Jackman vs. Dorland, 116 *Mass.*, 550. (An allegation in an answer to a declaration on a note, that if it shall appear that the defendant signed the note, "it will also appear that" (setting forth a contract); and concluding with an averment that the note, if given at all, was given upon the contract; that the plaintiff had broken it; and that there was no consideration for the note; and the defendant denies that he owes anything upon it;—sets forth no defence; because it states no facts but only what on a certain contingency may be the evidence at the trial.)

s. P., *Cassidy vs. Farrell*, 109 *Mass.*, 397.

Suit vs. Woodhall, 116 *Mass.*, 547. (Action for price of intoxicating liquors. Answer alleging defendant's ignorance of the claim, and, if it shall be made to appear that plaintiff sold the liquors, it will also appear that the liquors were sold in violation of law. *Held*, not to entitle defendant to prove that liquors were illegally sold.)

Cassidy vs. Farrell, 109 *Mass.*, 397. (General denial in action for liquors, coupled with statement that if plaintiff shall offer any evidence tending to prove the items, defendant will offer evidence that they were liquors, etc., etc., sold in violation, etc.)

s. P., *Porter vs. Kimball*, 1 *Mich.*, 239. (Statement that

defendant will give in evidence, etc., is not an allegation of the fact suggested.)

§ 728. *Unsupported conclusion*.—A general statement of legal effect or liability, if coupled with specific facts alleged as the ground thereof, which conflict with or even merely fail to support the general allegation, is not sufficient to let in evidence against objection, but may be disregarded as surplusage, and the complaint dismissed at the trial for insufficiency.¹

On the other hand, if specific facts alleged are sufficient to sustain the pleading, an allegation of an erroneous conclusion will not vitiate, unless it has misled the adverse party.²

¹ *Sheridan vs. Jackson*, 72 N. Y., 170. (An allegation that plaintiff is entitled to the possession of land and to rents and profits thereof, is a mere conclusion of law; and in an action for rent, if the facts from which such conclusion is drawn are not alleged, the complaint may be so dismissed.)

² This follows from the principles stated under the head of DEMURRER, §§ 89—121.

§ 729. *Clerical error*.—An obvious clerical error such as ought not to have misled the adverse party, is not ground for excluding evidence to establish the fact obviously intended to be alleged.

Johnson vs. Mo. Pac. Ry. Co., 96 Mo., 340; s. c., 9 *South West. Rep.*, 790. (Negligence: allegation that “defendant disregarding its duty to this defendant,” instead of “to this plaintiff.”)

[For other authorities see § 48, DEMURRER.]

[*Contra*, *Roberts vs. Lovell*, 38 Wisc., 211. (Here the complaint alleged that on a specified day when the “slandorous words hereinafter mentioned were spoken by defendants, the plaintiffs were husband and wife; and that on said day at a specified place, in the presence and hearing of certain persons, “maliciously spoke,” etc,—the person who so spoke not being designated.

Held, there being no allegation as to who spoke the words, except by the way of mere recital, the complaint was fatally defective, and the Court below properly excluded evidence and, on refusal of plaintiff to amend, rightly dismissed the action. On appeal the omission could not be supplied by inference or presumption, although the omission was the result of a mere clerical mistake.)]

§ 730. *Statutory fiction or presumption*.—Under a statute declaring that a specified fact shall be deemed another fact, or that one shall be presumed from the other, an allegation of the conclusion of fact sought to be established by the statutory presumption lets in evidence of the actual fact which has been declared equivalent to it,¹ unless the adverse party has been misled.

In Equity and under the New Procedure an allegation of the actual facts lets in evidence of them for the purpose of establishing the statutory conclusion or equivalent,² although that be not also alleged.

¹ The rule in the text seems to be established by the authorities cited under §§ 50—55, DEMURRER.

² *New York Life Ins. & Trust Co. vs. Covert*, 3 *Abb. Ct. App. Dec.*, 350; s. c., 29 *Barb. (N. Y.)*, 435. (20 years presumption of payment.)

Malloy vs. Vanderbilt, 4 *Abb. N. C. (N. Y.)*, 127, 133. (Holding to the rule stated in the text as the rule in Equity, but citing *Henderson vs. Henderson*, 3 *Den. (N. Y.)*, 314, as to the contrary at common law.)

§ 731. *Judicial notice*.—A party is not necessarily precluded from requiring the Court to take judicial notice of a fact, by having made an allegation inconsistent therewith in his pleading.

Lux vs. Haggin, 69 *Cal.*, 255; s. c., 10 *Pacif. Rep.*, 674, 776. [The better opinion is, that the variance may preclude the party under the same conditions as it may if he offered evidence contrary to his allegation.]

§ 732. *Several titles to same property.*—A party who claims by two titles, either of which would be good if available, should be permitted to introduce evidence of both.

Enders *vs.* Sternbergh, 2 *Abb. Ct. App. Dec.* (N. Y.), 31.
 s. p., Rank *vs.* Grote, 49 *N. Y. Super. Ct. (J. & S.)*, 502.
 (Allegations of title as heir at law, and also as title of devisee. Motion to strike out one denied, because allowing both need not embarrass defendant.)

§ 733. *Generality of allegation of matter in pleader's knowledge.*—If a fact alleged depends on matters peculiarly within the knowledge of the party pleading it, he may be required to state those matters with more particularity than would be otherwise necessary; but if this be not required before trial, a general allegation will let in evidence against objection first made there.

This principle of frequent application is well illustrated in *Herr vs. Hays*, 35 *N. Y.*, 331, 336, answer justifying alleged trespass, by alleging generally (1) a public way and (2) a private way. • *Held*, that the first defence was sufficient, for strangers passing along the street cannot be expected to know how it became a highway. That the second would have been obnoxious to motion to make more definite and certain, for one claiming a right of way is supposed to be cognizant of particulars; but as no motion was made before trial, objection if made at the trial would have been unavailing.

An objection to the introduction of any evidence in support of a demand contained in an answer, on the ground that it is too vague and indefinite, cannot prevail if it appears from kindred averments of the plaintiff's petition that the character of the transactions are well known to both parties. *Western Assur. Co. vs. Uhlhorn*, 41 *La. Ann.*, 385; s. c., 6 *So. Rep.*, 485.

[Compare §§ 544, 545.]

§ 734. *Irrelevant allegation.*—An allegation which is immaterial in the sense of being irrelevant should not be allowed to be proved,¹ for an irrelevant fact does not be-

come relevant merely by being alleged and denied,² nor by being alleged and admitted.³ The Court may of its own motion refuse to receive evidence as to such a fact.⁴

But this rule does not necessarily exclude proof of an allegation which would be clearly material were it not for a defect in the mode of stating it.⁵

¹ *Millerd vs. Thorn*, 56 *N. Y.*, 402; s. c., 15 *Abb. Pr.*, *N. S.*, 371.

² *Murray vs. N. Y. Life Ins. Co.*, 85 *N. Y.*, 236; s. c., 9 *Abb. N. C.*, 309. (Action of a legal nature on life policies, the complaint alleging that the death was not caused by the breaking of any conditions. This allegation was denied. *Held*, that the allegation was unnecessary, and it was error to allow it to deprive defendant of a right to the affirmative.)

s. p., *Burrows vs. Butler*, 38 *Hun (N. Y.)*, 157, 160. (Allegation and denial that plaintiff before suing executor or administrator offered to refer the claim, is no part of the issue for the jury.)

³ See §§ 550-560, ADMISSIONS.

⁴ *Corning vs. Corning*, 6 *N. Y.*, 97, 100. (Antecedent facts long past, relied on as a matter of provocation, in action for assault.)

⁵ *White vs. Spencer*, 14 *N. Y.*, 247, 251. (Under the rule that it is the judge's duty to reject evidence offered in support of immaterial issues, an issue is not deemed immaterial on account of the omission of some averment in the pleading which is essential to the full legal idea of the claim or defence attempted to be set up. If the Court can plainly see what the matter really attempted to be pleaded is, and such matter would be pertinent, the issue is not immaterial although such matter may be defectively stated.)

§ 735. *Relevant allegations not prejudiced by irrelevant.*—An offer to prove the material part of the issues is not to be excluded because the party does not propose to prove an unnecessary allegation which he has coupled therewith in his pleading.

Buell vs. Burlingame, 11 *Colo.*, 164. (The complaint on

defendant's breach of his express agreement to pay a note made by plaintiff and defendant, contained an allegation that plaintiff was forced and compelled to pay it; which the answer denied. *Held*, that force and compulsion were immaterial, as it was only necessary to show payment in order to maintain the action, and evidence showing simply payment was not therefore insufficient or irrelevant.)

Gulf, C. & S. F. Ry. Co. vs. Witte, 68 *Tex.*, 295; s. c., 4 *South West. Rep.*, 490. (Negligence. *Held*, that in proving the time at which the cause of action arose plaintiff was not confined to that laid in his petition although not stated under a *videlicet*.)

Farrior vs. Houston, 95 *N. C.*, 578. (Action to recover land. Defendant denied plaintiff's title, and improperly alleged evidence of facts showing possession for more than seven years, under color of title which if proved would not establish that defence under the statute. *Held*, reversible error to refuse to allow defendant to introduce evidence under the good plea as to the plaintiff's title.)

§ 736. *Changing line of proof: Alternative*.—Where the pleading does not restrict the party to one line of proof, and it is not necessary, for the prevention of surprise upon the adversary, to refuse to allow one line of proof to be abandoned, and an inconsistent one adopted, the Court may in its discretion allow this; and may receive and submit to the jury evidence from which they may find either of two alternative facts such as will support the case of the party.

Turner vs. Yates, 16 *How. (U. S.)*, 14, 25.

§ 737. *Materiality caused by course of the trial*.—Matter not pleaded may nevertheless be given in evidence if it has been made material by the course of the adverse party at the trial.

West vs. McConnell, 5 *La., O. S.*, 424; s. c., 25 *Am. Dec.*, 191. (Here defendant pleaded that plaintiff had, in an action pending in another State, attached sufficient

property to cover the claim now sued for. Plaintiff at the trial offered to release the attachment. *Held*, that defendant might prove, although he had not pleaded it, that plaintiff could not give an effectual release because his right under the attachment had in turn been levied on under another attachment at suit of a third person against the plaintiff.)

[*Denis vs. Snell*, 50 *Barb.* (N. Y.), 95; s. c., 34 *How. Pr.*, 467; 54 *Barb.*, 411, is not to the contrary, if sustained on the ground that there plaintiff alleged the exemption in his complaint, so that defendant might have pleaded the judgment as well as the execution if he had desired to prove the consideration and thus defeat the exemption.]

§ 738. *Duplicity not ground for exclusion.*—The objection that the complaint states in the same count two causes of action (which might be properly joined if separately stated), and leaves it in some doubt which the plaintiff intended to rely upon, if not raised by motion before the trial, is not ground for excluding evidence at the trial.

Commercial Bank vs. Pfeiffer, 108 N. Y., 242, 246; s. c., 13 N. Y. *State Rep.*, 506; 10 *Centr. Rep.*, 721. (Action against consignee who agreed with plaintiffs to accept drafts drawn by a third person against his consignments, but after receiving and selling the property, applied the proceeds to a prior claim against him. The Court say: "The complaint, perhaps, was liable to the objection that it stated two causes of action in the same count [guaranty and implied promise to account], and left it in some doubt as to whether the plaintiff intended to rely upon the guaranty, or upon an implied contract to account to the plaintiff for the proceeds of the consignment. This, however, is of no importance now; for the defect, if any there was, could have been taken advantage of only by motion to make the complaint more definite and certain, and was not open to such an objection upon the trial or afterwards. The case was tried upon the theory of showing all of the circumstances attending the transaction, and leaving it to the Court, to determine whether any cause of action was made out.")

S. P., *Barton vs. Gray*, 48 *Mich.*, 164; s. c., 12 *North West.*

Rep., 30. (Action on contract to cut and haul timber for defendant. One count alleging performance for a time, and wrongful discharge before being allowed to complete. Second count alleging performance for a time, then postponement by agreement at defendant's request from year to year, and then refusal to allow to perform. Third count, the same, but postponement at plaintiff's request. *Held*, that the inconsistency did not justify excluding or striking out evidence which tended to support either count, but such evidence should have gone to the jury. Reversed for error in this respect. COOLEY, J., said: "It is said that the three special counts are inconsistent with each other, and the first is repugnant to the others. The same evidence would not support the several causes of action; and it seems therefore to be supposed that by uniting the three in the same declaration they nullify and destroy each other. This is a mistake. It may be that the counts are so inconsistent that the same evidence would not support a judgment upon all (*Capen vs. Stevens*, 29 *Mich.*, 496), but no question of that sort could be raised until after verdict. The very object of several counts where there is but one contract is to vary the statement of the case so that some one count may correspond to any possible phase the case may assume on the evidence.")

§ 739. *Rights to costs and injunction.*—In an action of an equitable nature, if, by reason of facts intervening since the commencement of the action, plaintiff fails to establish his right to relief he has still a right to give evidence of facts material to the question of costs; and, if an injunction was granted, of facts material to the question of his right thereto at that time, for the purpose of avoiding liability upon the undertaking.

Kelley vs. McMahon, 37 *Hun* (N. Y.), 213; s. c., 22 *N. Y. Weekly Dig.*, 87.

§ 740. *Counterclaim and set-off.*—Evidence of a fact available only as a counterclaim is not to be excluded merely because the answer stated that it would be relied on as a "set-off," instead of saying "counterclaim," if defendant does not show that he was prejudiced.

Chatfield *vs.* Simonson, 92 *N. Y.*, 209, 216.

s. p., Metropolitan Trust Co. *vs.* Tonawanda, etc., R. R. Co., 18 *Abb. N. C.*, 368 ; s. c., 43 *Hun (N. Y.)*, 521. [Affirmed, it seems, on this opinion in 106 *N. Y.*, 673.]

§ 741. *Liberal interpretation.*—The allegations of a pleading are to be construed liberally for the purpose of sustaining it, if objection to it is first made by resisting the reception of evidence, after going to issue.

State *vs.* School Dist. No. 3, 34 *Kans.*, 237 ; s. c., 8 *Pacif. Rep.*, 208. (Action on school-district bonds. Error to sustain objections to sufficiency of allegations of validity and of performance of conditions precedent.)

Brickley *vs.* Walker, 68 *Wisc.*, 563 ; s. c., 32 *North West. Rep.*, 773. (Trover against a sheriff for seizure of plaintiff's lumber under an attachment against another person. *Held*, that failure to allege plaintiff's possession, or immediate right of possession, might be disregarded.)
Holstein *vs.* Adams, 72 *Tex.*, 485 ; s. c., 10 *South West. Rep.*, 560.

§ 742. *Minor objections waived by entering on evidence.*—If every essential fact is alleged or necessarily implied, and the defect objected to is in the form of the allegation, or in details of mode, manner, time, or place, or the omission of particulars, and the like, the intentment that the party pleading a fact intended to be understood as alleging it effectively, suffices to supply a mere omission of details ; and the adversary who has not objected by demurrer or motion, but has gone to issue, is to be deemed, at the trial, as having understood the allegation in the sense in which it may support the action or defence, and cannot object to evidence supplying the omitted details.

In the application of this principle, matter which can be implied by an adjective or adverbial clause qualifying an allegation in the pleading, may be deemed implied in support of the pleading.²

An allegation which is too broad—as, for instance, unrestricted as to time, or as to place, when the proof to be given under it must point to a particular time or place—may be deemed to be intended to cover the specific point, and will let in the evidence of it.³

An allegation which is merely equivocal, clearly capable of different meanings, but not apparently covering an evasive intent, will be construed in the sense which will support the pleading.⁴

But an allegation of a mere conclusion of law cannot be treated as sufficient.

³ *Barkley vs. State*, 15 *Kans.*, 99. (Complaint on a criminal recognizance failed to allege that the recognizance was ever filed as required by law, and defendants objected to evidence, because there could be no recognizance, as there was no record. *Held*, that even if so, yet as the petition alleged that the defendants did make “default,” and “did forfeit their recognizance, under the circumstances it was to be inferred by implication that the instrument sued on had been filed; and although the complaint would not have been sufficient on demurrer or motion, the defect was cured by evidence, findings, and judgment. The Court say: “Where the question of the sufficiency of a petition is raised for the first time, and only by an objection to the introduction of any evidence under it, the Court will always construe the allegations of the petition very liberally, so as to sustain the petition if it can be sustained; and if anything should intervene between the filing of the petition and the final rendering of the judgment which could by fair and reasonable intendment be construed to cure the defective allegations of the petition, the courts will hold that such defective allegations are thereby cured.”)

Barton vs. Gray, 48 *Mich.*, 164; s. c., 12 *North West. Rep.*, 30. (COOLEY, J., after saying the objections to the sufficiency of the declaration and to the validity of the contract might have been taken by demurrer, said: “We have observed of late a growing tendency towards the postponement of such objections until the parties have been put to the expense of a preparation for trial, or perhaps until, at great expense, a trial has been gone

through with ; and the practice is not one to be encouraged." "Objections which appear upon the face of the pleadings, and which are fatal in any stage of the case, should be taken at the earliest opportunity, and before unnecessary expense has been incurred ; and if the party entitled to take them fails to observe this reasonable and just rule, all intendments should be against him, and if possible to save the case by amendment, the necessary permission should be given. [Citing *Norton vs. Colgrove*, 41 *Mich.*, 544 ; *Burke vs. Wilber*, 42 *Mich.*, 327 ; *Lamb vs. Jeffrey*, 41 *Mich.*, 719.] A proper practice in this particular will save time to the courts and expense to the public as well as to the parties.")

- * *White vs. Spencer*, 14 *N. Y.*, 247. (Although an answer, in an action for flowing land, merely setting up possession and enjoyment of the easement for twenty years without alleging that it was exercised adversely, is bad on demurrer, still if plaintiff take issue, the answer will be sufficient to allow evidence of adverse user on the trial. On the question of the admission of evidence, a technical defect in a pleading will be disregarded at the trial. Judgment therefore reversed.)

Minor vs. Mechanics' Bank of Alexandria, 1 *Pet. (U. S.)*, 46 ; 7 *Law. ed.*, 47. (The law requires that every issue be founded on some certain points, that parties may not be taken by surprise, and that the jury be not misled by the introduction of various matters. But this rule as to certainty is framed for the benefit of the parties, and may be waived by them.)

- * *Foster vs. Elliott*, 33 *Iowa*, 216. (Reversible error to limit evidence of trespass to a particular spot where the allegation though specifying that spot was also more general.)

Hobbs vs. Memphis & C. R. R. Co., 9 *Heisk (Tenn.)*, 873. (Action for causing death, aided, by assuming a death caused within the State to be intended, without express allegation of the place.)

- * *Clare vs. National City Bank*, 14 *Abb. Pr. N. S.*, 326 ; s. c., 35 *N. Y. Super. Ct. (J. & S.)*, 261. (In construing a pleading for the purpose of determining the admissibility of evidence, a restricted meaning should not be given to words which are clearly susceptible of a more liberal construction, unless the whole pleading shows that the language was used in its restricted sense ; especially so when such restricted interpretation would exclude a defence on the merits. Here plaintiff alleged that he was injured through the negligence of the de-

fendants in the making of alterations to a building owned by them. The defendants admitted ownership, and that they "caused the alteration," and denied every other allegation. *Held*, that defendants could prove that the work was done by contractors, over whose workmen they had no control. The admission that they caused the work did not imply that the workmen engaged in the work were in the employ of defendants.)

2. EFFECT OF BILL OF PARTICULARS.

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|-----------------------------------------------------|-------------------------------------------------------------------|
| § 743. Evidence beyond bill not admissible. | § 748. Matter in avoidance of the adversary's case. |
| 744. Bill need not repeat what is in the pleading. | 749. Effect of variance between bill of particulars and evidence. |
| 745. Bill cannot enlarge or change cause of action. | *750. Voluntary bill. |
| 746. Indefiniteness. | 751. Unverified bill. |
| 747. Several counts and one bill. | 752. Effect of failure to serve. |
| | 753. Bill of particulars as evidence. |

§ 743. *Evidence beyond bill not admissible.*—The rule that evidence of matters beyond the bill of particulars is not admissible¹ applies as well to restrict the amount claimed² as the items upon which the claim is made.

But the party is not concluded by a mistake in carrying out the rate or price into the sum of items.³

¹ *Bowman vs. Earle*, 3 *Duer* (N. Y.), 691; *Starkweather vs. Kittle*, 17 *Wend.* (N. Y.), 21, as examined in *McDonald vs. People*, 126 *Ill.*, 150; s. c., 9 *Am. St.*, 547. (Holding that the bill limits the charge at the trial.)

Board of Comm'rs of Alleghany County vs. Adams, 43 *Md.*, 349. (Particulars of claim to official salary as principal, precludes evidence of claim for other kinds of service.)

² *Walker vs. Wadsworth*, 1 *Fost. & Fin.*, 397, (refusing on default to give judgment for full amount of interest, because the interest had been understated in the bill of particulars.)

³ *Ames vs. Quimby*, 106 *U. S.*, 342; s. c., 27 *Law. ed.*, 100.

§ 744. *Bill need not repeat what is in the pleading.*—Evidence is not to be excluded because the matter was not stated in the bill of particulars if it was stated in the pleading under which the bill was furnished with as much particularity as would have been necessary in the bill of particulars, had it not been stated in the pleading.

Davis *vs.* Freeman, 10 *Mich.*, 188. (Plaintiff declared on a special contract, which he set out in *hæc verba*, and also on the common counts ; and on demand furnished a bill of particulars, which did not, however, refer to the contract. *Held*, that the contract was properly admitted in evidence.)

People *ex rel.* Waring *vs.* Monroe, 4 *Wend. (N. Y.)*, 200. (Declaration on a note, and also for physician's services : the bill of particulars did not specify the note. *Held*, proper to receive the note in evidence. SAVAGE, Ch. J., said : "The use of a bill of particulars is to apprise a party of the specific demands of his adversary when the pleadings are general, and leave uncertain what is particularly demanded either in a declaration or notice of set-off ; and has no application whatever when the demand is specifically set forth in the pleading.")

s. P., Vannoy *vs.* Klein, 122 *Ind.*, 416 ; s. c., 23 *North East. Rep.*, 526. (Variance in caption as to names of parties disregarded.)

To same effect, Cooper *vs.* Amos, 2 *Car. & P.*, 267.

§ 745. *Bill cannot enlarge or change cause of action.*—The bill of particulars cannot change the cause of action or enlarge the grounds of recovery.¹ But it may perhaps let in evidence of items within the scope of the cause of action alleged in the pleading, though not within the period of time there alleged.²

¹ *McVane vs. Williams*, 50 *Conn.*, 548. (Particulars for cash lent, and money had and received, will not let in evidence of money exacted by duress.)

Steinman vs. Slaymaker, 1 *W. N. C. (Pa.)*, 132. ("Money advanced by plaintiff to defendant" would only let in evidence of technical loan.) [*Contra*, *Lockhart vs. Morey*, 41 *La. Ann.*, 1165.]

Pickering vs. De Rochemont, 45 *N. H.*, 67. (Declaration

showing indebtedness to husband and wife jointly; nonsuit proper, because particulars and evidence showed indebtedness to wife only before marriage.)

C., St. L., etc., R. *vs.* Provine, 61 *Miss.*, 288. (Action for non-delivery of cotton shipped in November, 1879, and March, 1880. *Held*, error to allow the bill to be amended so as to include a charge for cotton lost "during the cotton season of 1879-80," for the bill, as so amended, did not give specific information as to the cotton sued for, and it enlarged the scope of the declaration. COOPER, J., said: "The office of a bill of particulars is to give the defendant specific information of the cause of action, a detailed statement of which cannot in many cases be intelligently given in the declaration without great prolixity. It cannot, therefore, be less specific than the declaration, nor include any items not embraced in the scope of the declaration.")

Lee *vs.* Flint (*N. Y. City Ct.*), *N. Y. Daily Reg.*, Dec. 29, 1884. (Plaintiff sued for wrongful dismissal, but failed to establish it. *Held*, error to allow him to prove services rendered before dismissal, not claimed in the complaint, though stated in the bill of particulars. Such recovery could not be had under the claim of damages for wrongful dismissal, and the bill of particulars gives no right to prove a cause of action which plaintiff could not prove in the absence of the bill of particulars.)

* Haines *vs.* Haines, 24 *N. Y. Week. Dig.*, 267. (Complaint for goods sold. *Held*, not error to allow proof of items sold and delivered after the complaint was verified, but before it was served, as the bill of particulars gave information that plaintiff claimed to recover for these subsequent items, and they were within the cause of action, though not within the time alleged.)

§ 746. *Indefiniteness*.—A bill of particulars which does not inform the adverse party as to any details of the claim of the party furnishing it, is not sufficient to let in evidence.¹

But neither indefiniteness in a statement of the theory or *grounds* of claim,² nor a lack of particularity which might have been corrected by objection before trial,³ is a ground for excluding evidence.

¹ Babcock *vs.* Thompson, 3 *Pick. (Mass.)*, 446; s. c., 15 *Am.*

Dec., 235. (Declaration for money had and received; bill specified only "bank bills," "bills," and "checks," for sums stated. *Held*, that evidence of money fraudulently won at cards was not admissible, because the bill did not inform defendant.)

* *Taylor vs. Dexter Engine Co.*, 146 *Mass.*, 613; 16 *North East. Rep.*, 462. (Declaration for "warehouse room furnished for the storage of an engine." Bill of particulars for "use of store basement." *Held*, not to restrict plaintiff to a claim for use and occupation.)

Wright vs. Dickinson, 67 *Mich.*, 580; s. c., 35 *North West. Rep.*, 164; s. c., 12 *West. Rep.*, 33. (Common counts in assumpsit: the particulars specified money paid on a land contract without consideration, because defendant had no title to convey. *Held*, error to exclude evidence showing the contract to be void under the statute of frauds. Plaintiff was not to be confined to defendant's want of title. CHAMPLIN, J., said: "Whether the want of consideration arose from the fact that the defendants had no title to convey, or whether the contract was void for want of due execution, was not material to be stated, only so far as such statement was proper to apprise the defendants of the claim of plaintiff, and afford them an opportunity to be prepared to try the case upon the merits.")

Seaman vs. Low, 4 *Bosw. (N. Y.)*, 337. (Common counts: particulars of payments made by plaintiff on stock which defendant induced him to purchase, describing it as "money received by defendant, on account of stock which defendant never delivered to plaintiff." *Held*, error to exclude proof that the purchase was induced by the fraudulent representations of defendant, and that plaintiff could recover on the ground of deceit.)

Robinson vs. Weil, 45 *N. Y.*, 810. (Particulars contained a charge for professional services "per agreement." *Held*, error to exclude evidence as to value, on the ground that the special agreement fixed the value. RAPALLO, J., says: "The plaintiff was not precluded, by the form of his bill of particulars, from proving and recovering the value of the services, though he should fail to prove an agreement for the payment of a specified sum therefor.")

* *Hayes vs. Wilson*, 105 *Mass.*, 21. (Claim for "work on house," where defendant did not move for a more definite specification, lets in evidence of work done "in grading about the house.")

Freehling vs. Ketchum, 39 *Mich.*, 299. (Common counts for goods sold, work and labor, money lent, money had

and received, and account stated. Bill of particulars containing separate charges for the aggregate value of goods furnished to sell on commission, on specified dates, but not specifying the separate articles. *Held*, there having been no objection before trial, that it was error to exclude evidence of the commission transactions.)

§ 747. *Several counts and one bill*.—Where there are several counts in the pleading, a bill of particulars, not expressly confined to less than all, may avail under either.¹ If appropriate to one only, it is the better opinion that it does not preclude the party from proving what is expressly and sufficiently alleged in the other, unless the adverse party has been misled.²

¹ *Hunter vs. Welsh*, 1 *Stark.*, 178. (Count for goods delivered to defendant to be sold, and count for goods sold and delivered to defendant. Bill of particulars of goods sold and delivered to defendant. *Held*, applicable under either count. It merely stated the component ingredients of the debt.)

² *Dean vs. Mann*, 28 *Conn.*, 352. (Assumpsit. First count, special, on a check drawn by defendant to plaintiff's order. Third, Indebitatus assumpsit for money lent. Plea, general issue. For a bill of particulars plaintiff filed a copy of the check, which defendant claimed was confined to the first count, and that he was misled in allowing it to apply to the third.)

Hess vs. Fox, 10 *Wend. (N. Y.)*, 437. (Bill variant from the special count may yet avail under a general count.)

[*Compare Zacarino vs. Pallotti*, 49 *Conn.*, 36, 39. (Holding that a bill of particulars not restricted to part of the counts amounts to saying, "This is all my claim;" and the party serving it will be precluded from proving other matters alleged in the pleading, but not mentioned in the bill.)]

§ 748. *Matter in avoidance of the adversary's case*.—The fact that plaintiff is precluded from giving evidence of a particular matter as a part of his case, by his omission to specify it in his bill of particulars, does not preclude him from giving it in evidence, not as a ground of

recovery, but as collateral evidence to rebut the adversary's defence.

Duncan vs. Hill, 2 *Brod. & Bing.*, 682. (Separate counts on three bills of exchange: bill of particulars mentioning only the bill set forth in the first count. *Held*, error to exclude his offer of the others to overcome the defence that defendants were not partners when the bill was made.)

Wilson vs. Deacon, 9 *W. N. C. (Pa.)*, 47. (Not error to allow a debt not stated in the bill, to be proved to show that a credit claimed was specifically appropriated.)

§ 749. *Effect of variance between bill of particulars and evidence.*—The object of a bill of particulars is to give the party applying for it more definite notice of the question he must be prepared to try; and a variance which could not have misled may be disregarded.

Illustrations.—Variance as to the year in *date* disregarded. *Duncan vs. Ray*, 19 *Wend. (N. Y.)*, 530; *Millwood vs. Walker*, 2 *Taunt.*, 224; *Vidal vs. Clarke*, 2 *Rich. (S. C.) L. R.*, 359.

[In the latter case, *held*, the variance was no ground for nonsuit, though possibly it might have been ground for excluding the evidence.]

Description.—*Davies vs. Edwards*, 3 *Maule & S.*, 380. (Action for rent of premises; variance in location disregarded, because defendant could not have been misled.)

Amount.—*Collins vs. Beecher*, 45 *Mich.*, 436. (Action for work and labor: particulars specifying dates and amounts, aggregating \$273. *Held*, error to exclude a due-bill for \$137. A variance consisting in the fact that the due-bill did not specify dates of the work is merely technical. The paper was admissible as showing an indebtedness at its date, although, standing alone, it might not go far enough to make out plaintiff's case.)

Smith vs. Hicks, 5 *Wend. (N. Y.)*, 48. (Action on an agreement by defendant to bear half of any loss in a certain transaction: bill of particulars stated half of \$1211 as due, and the proof showed plaintiff entitled to recover, if at all, half of \$1288. *Held*, proper to refuse nonsuit. Defendant was duly apprised of the nature of plaintiff's claim, and plaintiff could recover half the smaller sum.)

Amount of interest.—*Lanning vs. Swarts*, 9 *How. Pr. (N.*

- Y.), 434. (Variance between amount of interest claimed in bill of particulars and amount claimed in account presented before suit against executors or administrators, does not defeat plaintiff's right to costs.)
- Omission of interest clause in note disregarded. *McNair vs. Silbert*, 3 *Wend.* (N. Y.), 344.
- Person.*—*Enright vs. Seymour*, 8 *N. Y. State Rep.*, 356. (Bill of particulars stating payments in settlement of a criminal charge against *defendant*. Proof of such payments on such charge against *defendant's son*; fatal variance.)
- Harding vs. Griffin*, 7 *Blackf. (Ind.)*, 462. (Particulars stating ordinary charge of cash. Proof of overpayment as executor to legatee: fatal variance, because the general charge did not manifest intention to make such proof.)
- Medium of payment.*—Money or property. *Waterman vs. Waterman*, 34 *Mich.*, 490. (Particulars specifying money loaned. Error to receive evidence of loan of United States bond.)
- [*Contra*, *Bonney vs. Seeley*, 2 *Wend.* (N. Y.), 481. (Money paid as surety for the adverse party, evidence of conveyance of land in payment admissible.) s. p., *Davis vs. Hunt*, 2 *Bailey (S. C.)*, 412.]
- Release and payment.*—*Brown vs. Williams*, 4 *Wend.* (N. Y.), 368. (Particulars stating receipt of double payment from two persons: proof of release given to one with covenant not to sue. *Held*, that it amounted to payment, and defendant could not be surprised.)
- Holland vs. Hopkins*, 2 *Bos. & Pul. Rep.*, 243. (Money received, and sale by which it was received.)

§ 750. *Voluntary bill.*—A bill voluntarily furnished precludes the party furnishing it from giving evidence of matters not within it, equally as if it had been furnished under order of the court or judge.

Williams vs. Allen, 7 *Cow.* (N. Y.), 316.

§ 751. *Unverified bill.*—The omission of a party who serves a bill of particulars to verify it, is not ground for excluding evidence at the trial. He should have promptly returned it or moved for a further bill.

Dennison vs. Smith, 1 *Cal.*, 437.

Hoag vs. Weston, 10 *N. Y. Civ. Pro. Rep.*, 92.

Paine vs. Smith, 32 *Wis.*, 335.

§ 752. *Effect of failure to serve.*—It is the better opinion, that the omission of a party to furnish a bill of particulars when ordered, is not ground of excluding evidence, unless an order has been obtained before trial, precluding evidence because of the default.

This is the rule as to furnishing on demand a copy of an account mentioned in pleading. There is some difference of practice as to whether it is applicable to a bill of particulars.

The better opinion is that non-compliance with an order for particulars may be waived; and that to entitle the party to object as matter of right against the reception of evidence on account of such failure, he should obtain before trial an order precluding evidence on that ground.

MONELL, J., in *Dowdney vs. Volkening*, 37 *N. Y. Super. Ct. (J. & S.)*, 313, 319, says that the former practice required the order precluding the evidence to be obtained before trial, citing *Grah. Pr.*, 519.

An amendment of the pleading by inserting all the particulars required, may supersede the necessity of complying. *Feiertag vs. Feiertag*, 80 *Mich.*, 489; s. c., 45 *North West. Rep.*, 188.

§ 753. *Bill of particulars as evidence.*—At Common Law, the bill of particulars, especially if furnished by order of the court or judge, is not competent evidence against the party furnishing it.¹

Under the New Procedure it is competent evidence; but a credit given in the bill of particulars is to be construed in connection with the allegations and denials of the pleadings, and is not to be taken as an absolute admission, but rather as contingent or conditional upon the establishment of the debit side of the bill.² And if the adverse party claims the benefit of the admission, he cannot object to allowing the other side of the bill to go to the jury.³

¹ *Harrington vs. MacMorris*, 5 *Taunt.*, 228. (Plaintiff nonsuited because the only evidence of the indebtedness alleged was a credit given in defendant's bill of particulars.)

To same effect, *Miller vs. Johnson*, 2 *Esp.*, 602.

Hartell vs. Seybert, 1 *Trou. & Ha. Prac.*, § 475. (*Dictum*: Original bill not evidence after amendment.)

Brittingham vs. Stevens, 1 *Hall (N. Y.)*, 379. (Error to allow plaintiff to read in evidence the bill of particulars of defendant's set-off, for the purpose of proving a certain payment. The Court say: "The bill of the particulars of the defendant's set-off was not proper testimony to prove any fact: . . . a party giving a bill of particulars under a judge's order is never held thereby to furnish evidence against himself; and it is in practice considered as a part of the pleadings.")

s. p., *Starkweather vs. Kittle*, 17 *Wend. (N. Y.)*, 20. (Holding that admission in one count is not evidence against plaintiff on the issue, under any other count.)

[*Compare Colson vs. Selby*, 1 *Esp.*, 452. Assumpsit: plea in abatement, that the promises were made by defendant and another jointly: replication, that they were made by defendant solely. The bill of particulars showed that they were by defendant and another jointly. LORD KENYON held, defendant's plea warranted, because plaintiffs were bound by the particulars, and directed the plaintiff to be nonsuited.]

² *Case vs. Pharis*, 106 *N. Y.*, 114; s. c., 12 *North East. Rep.*, 431; 7 *Centr.*, 779.

s. p., *Sherwood vs. Hauser*, 94 *N. Y.*, 626. (Holding it not conclusive as evidence; and that after amendment stating a larger *quantum meruit*, the smaller first estimate might be explained.)

³ *Thompson vs. Hovey*, 43 *Ill.*, 197. (Error to instruct that plaintiffs must have proved a claim for more than an amount which they credited in their bill of particulars, or defendant must have a verdict. WALKER, C. J., says: "An account of this character is a statement in writing by the plaintiff, and if the other party desires to avail himself of the statement he must permit the whole of it to go to the jury.")

3. EFFECT OF ADMISSIONS.

§ 754. Admissibility of evidence.

§ 754. *Admissibility of Evidence to prove admitted fact.*—It is not error to exclude evidence of a fact which stands admitted (even tacitly¹) on the pleadings forming the issue under which it is offered, for the fact is not in issue.²

It is not reversible error to receive it, for it is harmless.³

¹ *Turner vs. White*, 73 *Cal.*, 299; *Hooper vs. Beecher*, 4 *N. Y. State Rep.*, 473; *Setty vs. Town of Hamlin*, 46 *Hun (N. Y.)*, 1.

² *Silcox vs. Lang*, 78 *Cal.*, 118; s. c., 20 *Pac. Rep.*, 297. *Donnelly vs. Burkett*, 75 *Iowa*, 613; s. c., 34 *North West. Rep.*, 330.

The Hardwick, *L. R.* 9 *P. D.* 32; 50 *L. T.* 128. (Not to be allowed except by permission of the Court on special grounds.)

See also *Abb. Civ. Jury Brief*, 45.

³ *Robert vs. Good*, 36 *N. Y.*, 408; *Richards vs. Millard*, 56 *N. Y.*, 574, rev'g 1 *Supm. Ct. (T. & C.)*, 247; *Williams vs. Guile*, 46 *Hun (N. Y.)*, 645.

4. EFFECT OF DENIALS.

[For the requisite form of a denial to raise an issue, see §§ 571-614.]

§ 755. Denial lets in any facts contrary to allegation. § 757. Former adjudication.

756. General denial: distinguished from general issue. 758. General denial not impaired by defective special defence.

§ 755. *Denial lets in any facts contrary to allegation.*
—A denial lets in not only testimony formally contradicting the allegation denied, but also evidence of what the contrary facts were.

Caldwell vs. Bruggerman, 4 *Minn.*, 270. (Under general denial of complaint alleging ownership, defendant may show who was true owner.)

Welton vs. DeYarman, 26 *Nebr.*, 59. (Action for cutting wood from plaintiff's land. *Held*, that a denial let in not only defendant's testimony that he cut none from plaintiff's land, but also other testimony that he cut from land of another; and this need not be specially pleaded.)

§ 756. *General denial: distinguished from general issue.*—At Common Law the general issue lets in evidence of anything to show that plaintiff never had a cause of action,¹ and any evidence in mitigation of damages.²

Under the New Procedure, a general denial lets in any evidence tending to controvert what plaintiff is bound to prove in the first instance to make out his cause of action.³

It is the better opinion that, in the absence of any provision of statute to the contrary, it lets in evidence to controvert any jurisdictional allegation in the complaint;⁴ and also to controvert any amount, or value, or other matter though not essential to a cause of action but which is properly alleged in the complaint as affecting the measure of relief,⁵ even though such allegation might not be issuable by itself alone.

It does not let in any evidence of an excuse or justification not involved in the mere negating of what plaintiff is bound to prove,⁶ nor of facts relied on to discharge or relieve from a liability once incurred.⁷

¹ It varied both in form and effect in different actions, but with some exceptions it denied the conclusion of law on which plaintiff rested, and therefore usually let in many defences which under the Codes must be specially pleaded.

² *Costar vs. Davies*, 8 *Ark.*, 213; s. c., 46 *Am. Dec.*, 311.
Delevan vs. Bates, 1 *Mich.*, 97; *Kinnie vs. Owen*, *id.*, 249
Davis vs. Franke, 33 *Gratt. (Va.)*, 413.
Fraser vs. Berkeley, 2 *Moody & Rob.*, 3.

³ *Griffin vs. Long Island Railroad Co.*, 101 *N. Y.*, 348; s. c., 9 *Civ. Pro. R.*, 84; s. c., 23 *Weekly Dig.*, 174. (EARL, J., said: "Under our system of practice, and under every rational, logical system of pleading, the defendant must, under a general denial, be permitted to controvert by evidence everything which the plaintiff is bound in the first instance to prove to make out his cause of action." [Citing *Robinson vs. Frost*, 14 *Barb.*, *N. Y.*, 536; *McKyring vs. Bull*, 16 *N. Y.*, 297; *Wheeler vs. Billings*, 38 *id.*, 263; *Weaver vs. Barden*, 49 *id.*, 286.])

Thus if evidence of non-payment is necessary under the allegations of the complaint, as in case of an indemnity, a general denial lets in evidence of payment. *O'Brien vs. McCann*, 58 *N. Y.*, 373; *Knapp vs. Roche*, 94 *id.*, 329. Otherwise not, even though non-payment be alleged. *McKyring vs. Bull*, 16 *id.*, 297.

⁴ In the Federal courts, an express allegation contrary to a jurisdictional allegation is required by some authorities. See §§ 610-614.

⁵ On this point the authorities are in much conflict. The sound test for doubtful cases seems to be, to ask what the complaint alleges. Whatever it alleges in such manner as to entitle plaintiff to adduce evidence thereof, as necessary either to make out a cause of action, or to establish the measure of relief, a general denial allows defendant to rebut by evidence, except in those cases where a statute requires a specific or a positive affirmative allegation to the contrary.

Whether mitigation of damages is within this rule has been doubted in New York, since the adoption of the provision that a partial defence must be expressly pleaded as such. The better opinion is that a general denial not being a partial defence, is not affected by this provision, but still lets in matter controverting plaintiff's evidence, even though only by mitigation.

Compare *Muser vs. Lewis*, 14 *Abb. N. C. (N. Y.)*, 333; *Edwards vs. Nichols*, 21 *N. Y. Weekly Dig.*, 238, and §§ .

⁶ *Clifford vs. Dam*, 81 *N. Y.*, 52. (License.)

⁷ *Brazil vs. Isham*, 12 *N. Y.*, 9. (Award as a bar.)

[For numerous illustrations of the rule in the text see the particular facts mentioned in subd. 6, below; p. 638.]

§ 757. *Former adjudication.*—A general denial does not let in an adjudication relied on as a bar adverse to

the right of recovery,¹ but it does let in an adjudication relied on as in the nature of an admission to the contrary of an allegation in a complaint, even though the adjudication establish a conclusive admission.²

¹ *Brazill vs. Isham*, 12 *N. Y.*, 9. (It does not enable defendant to avail himself of an award of arbitrators as a bar, even if proved by the plaintiff.)

² *Terry vs. Munger*, 49 *Hun (N. Y.)*, 560, 563. (HAIGHT, J., says: "The complaint charged a conversion; the defendant, under his answer, could show any facts tending to show that there was no conversion. If the plaintiffs had made statements to other persons, to the effect that the machinery had been sold and not converted, such statements would be competent evidence; and if, in an action which they have brought, they had alleged a sale instead of a conversion, the judgment-roll in that action would be competent evidence for the purpose of disproving the allegation of the complaint in this action, that there was a conversion. (*Krekeler vs. Ritter*, 62 *N. Y.*, 372.") And this decision was affirmed in 121 *N. Y.*, 161, 171, on the same ground.)

To same effect, *Foye vs. Patch*, 132 *Mass.*, 105.

§ 758. *General denial not impaired by defective special defence.*—That which is admissible under the general issue or a general denial is none the less so because he has also pleaded it specially but in a defective or variant manner.

Whitaker vs. Bramson, 2 *Paine (U. S.)*, 209.

Bradley vs. Field, 3 *Wend. (N. Y.)*, 272.

5. EFFECT OF INTERLOCUTORY DECISIONS ON THE PLEADINGS.

§ 759. Order on demurrer.

760. Effect of motion to strike out or omission to move.

§ 761. Allegation mutilated by striking out part.

762. Objector who induced the objectionable pleading estopped.

§ 759. *Order on demurrer.*—An order sustaining or

overruling a demurrer, without judgment, does not preclude pleading or proving facts held by the order to have been improperly pleaded, nor proving the contrary, or facts which, by demurring, were admitted for the purposes of the demurrer.

[Compare §§ 519, 520, DEFINING THE ISSUES.]

Rhode Island vs. Massachusetts, 14 *Pet.*, (*U. S.*), 210.

Coffee vs. Groover, 123 *U. S.*, 1.

Crawford vs. The William Penn, 3 *Wash. (U. S. C. Ct.)*, 484.

Smith vs. Britton, 2 *N. Y. Supm. Ct. (T. & C.)*, 498.

[The reason is, that if the objection be insufficiency, or want of jurisdiction, or the absence of an indispensable party, the objection may be taken at any time; and if it be any other objection appearing on the face of the complaint, taking it by demurrer was necessary (under the provision usual in the Codes) to prevent waiving it. See §§ 659-661.]

[*Contra*, Boyd vs. Sims, 87 *Tenn.*, 771; s. c., 11 *South West.*, 948,

An ambiguous pleading should be construed as not intended to set up matter which the Court has decided improper in this cause. See *People ex rel. Barton vs. Rensselaer Ins. Co.*, 38 *Barb. (N. Y.)*, 323, 335.

§ 760. *Effect of motion to strike out or omission to move.*—A party who has omitted to move to strike out irrelevant and redundant matter from his adversary's pleading,¹ or whose motion to do so has been denied,² does not, by proceeding to trial, waive the right to object at the trial to the same matter as surplusage, and to evidence thereunder as irrelevant.

¹ *Town of Essex vs. Canada, etc.*, R. Co., 8 *Hun (N. Y.)*, 361.

² *Ida County vs. Woods*, 79 *Iowa*, 148; s. c., 44 *N. West. Rep.*, 247. [Citing *Specht vs. Spangenberg*, 70 *Iowa*, 488; s. c., 30 *North West. Rep.*, 875; *Kline vs. Railway Co.*, 50 *Iowa*, 656; *Coakley vs. McCarty*, 34 *id.*, 105.]

§ 761. *Allegation mutilated by striking out part.*—If a party who has procured matter to be struck out of his

adversary's pleading, goes to trial upon the residue of it, without further objection, he cannot object at the trial to its being read as it stands in the mutilated form for the purpose of letting in evidence of the adversary, even if the effect is to let in evidence as freely as if nothing had been stricken out.

See *County of Nemaha vs. Frank*, 120 *U. S.*, 41. (Holding that after special matter had been stricken out, leaving the general clause denying everything not admitted, everything was denied. Action on county bonds. Answer alleged facts which might have been proven under general denial, and added: "Defendant has no knowledge as to whether the plaintiff is a *bona fide* holder of said bonds, or any part thereof, or whether he purchased them before due or paid any value therefor, or purchased them at all, and therefore, for the purpose of raising the issue and procuring the proof thereon by compulsory process, defendant denies the allegations of the petition on that subject, and also denies each and every allegation contained in said petition, except such as it has herein expressly admitted in this answer." On plaintiff's motion the allegations of special facts were struck out. *Held*, that as the above-quoted clause in the answer remained, it formed the issue which was tried. MATTHEWS, J., said: "It is a general denial of each and every allegation of the petition, as no allegation of the petition was otherwise admitted in the answer. It therefore put the plaintiff upon proof of every fact necessary to constitute the cause of action set out in his petition, and embraced a denial of the legality and validity of the bonds, and the lawfulness of their issue and delivery. It required the plaintiff to show by competent proof that he was the owner of the coupons sued on, taken from bonds in fact executed by the defendant, issued in accordance with law, and delivered to a party competent to receive the title. It permitted proof on the part of the defendant of every fact which tended to establish that the bonds were illegal and void." Hence, defendant not being injured by striking out his allegations was not entitled to reversal on that ground.)

But matter thus stricken out which admitted a fact, although by the striking out the fact stands denied upon the pleadings, may be read in evidence to the jury as an admission. *Peckham Iron Co. vs. Harper (Ohio)*, 11 *Weekly L. Bul.*, 263.

§ 762. *Objector who induced the objectionable pleading estopped.*—To meet the adversary's objections to the sufficiency of the pleadings, it is competent to show that the pleadings were previously as he now claims they should be, and that he obtained a ruling from the Court requiring the change to the condition of which he now complains.

(This seems to result from the principle stated on p. 110. s. p., with further authorities, 22 *Abb. N. C. (N. Y.)*, 271-275; 23 *id.*, 148, 166-168. s. p., *Dyer vs. Scalmanini*, 69 *Cal.*, 637; s. c., 11 *Pacif. Rep.* 329; *Schlieder vs. Martinez*, 38 *La. Ann.*, 847; *Henderson vs. Stanford*, 105, *Mass.*, 504.)

6. PARTICULAR SUBJECTS OF ALLEGATION. (Alphabetically arranged.)

ABBREVIATIONS, § 763.

ACCORD AND SATISFACTION, §§ 765, 766.

ACCOUNT, §§ 767-770.

ACCOUNT STATED, § 771-773.

ACCOUNTING, § 774.

ACTION PREMATURE, § 775.

ADEQUATE REMEDY EXISTING AT LAW,
§ 776.

ADVERSE CLAIM, § 777.

ADVERSE POSSESSION, § 778.

AGENCY, §§ 779-781.

AMOUNT, §§ 782-784.

ASSIGNMENT, §§ 785-787.

ASSOCIATION, § 788.

AUTHORITY, §§ 789, 790.

BONA FIDE PURCHASE, § 791.

BY-LAW, § 792.

CAPACITY, § 793.

CONSENT, § 794.

CONSPIRACY, §§ 795, 796.

CONTRACT, §§ 797-822.

CORPORATION, § 823.

COSTS, §§ 824, 825.

DAMAGES, §§ 826-839.

DATE, § 840, 841.

DEMAND, § 842.

DETENTION, §§ 843, 844.

DEFECT OF PARTIES, §§ 845-848.

DOCUMENTS, §§ 849-871.

"DULY," § 872.

ELECTION OF RIGHT OR REMEDY,
§ 873.

ENTRY, § 874.

ESTOPPEL, §§ 875-881.

FACTS OCCURRING PENDING SUIT,
§§ 882-893

FOREIGN LAW, § 894.

FORMER RECOVERY, § 895.

FRAUD, §§ 896-909.

HEIR, § 910.

ILLEGALITY, §§ 911-914.

INDEBTEDNESS, § 915.

INFANCY, § 916.

INSANITY, § 917.

INTEREST, § 918.

JUDGMENT, § 919.

JURISDICTION, §§ 920-923.

LEAVE TO SUE, § 924.

LIMITATIONS, § 925.

MISNOMER, §§ 926-928.

MISTAKE, §§ 929-932.

NEGLIGENCE, §§ 933-937.

NUISANCE, § 938.

OFFER, § 939.

ORDINANCE, § 940.

OWNERSHIP, § 941, 942.

PARTNERSHIP, §§ 943-947.

PAYMENT, §§ 948-953.

REAL PARTY IN INTEREST, § 954.

TENDER, § 955.

TITLE, §§ 956-961.

TORTS, §§ 962-964.

ABBREVIATIONS. [Abbreviations in the pleading itself, as distinguished from a document pleaded, are treated under § 129, DEMURRER.]

§ 763. Abbreviation in instrument pleaded.

§ 763. *Allegation of meaning.*—If an instrument contain an abbreviation or other character the meaning of which is essential to the case of the party pleading it, but which the Court cannot judicially notice,¹ the instrument with oral evidence of the meaning is competent if the instrument was pleaded according to its legal effect, indicating such to be its meaning,² or if it was pleaded by copy with an added allegation showing the meaning.

If such an allegation be necessary under the New Procedure, it may be added by amendment.

¹ That the Court may take judicial notice of abbreviations in common use without evidence or pleading, see *Abb. Brief on the Facts*, 2, § 3.

² *Comstock vs. Savage*, 27 *Conn.*, 184, 190.

United States vs. Hardyman, 13 *Pet. (U. S.)*, 176, 179. (Criminal case.)

Wilson vs. Coleman, 81 *Ga.*, 297.

Even under the strict rule of the common law, a variance caused by the use of an abbreviation is immaterial if the jury consider the meaning to be the same. *Lewis vs. Few*, 5 *Johns. (N. Y.)*, 1, 29. (Reviewing English cases.)

ACCORD AND SATISFACTION. [See also **PAYMENT**, and **SET-OFF**. For further rules as to this defence, see **TRIAL EVIDENCE**.]

§ 765. Must be specially pleaded. § 766. Lets in evidence of payment.

§ 765. *Must be specially pleaded.*—Accord and satisfaction must be specially pleaded as such, to be admissible in evidence as a defence at the trial.¹

But it may be inserted by amendment if plaintiff is not misled.²

¹ *Wheaton vs. Nelson*, 77 *Mass.* (11 *Gray*), 15. (Holding that it could not be proved under an allegation of payment or set-off.)

² *Brett vs. First Union Ch.*, 63 *Barb.* (N. Y.), 610, 613.

§ 766. *Lets in evidence of payment.*—Under allegation of accord and satisfaction, defendant may be allowed to prove payment if plaintiff has not been misled.

Prouty vs. Eaton, 41 *Barb.*, (N. Y.), 409.
[Compare *Wheaton vs. Nelson* above cited.]

ACCOUNT. [See also §§ 771–773, **ACCOUNT STATED**; and §§ 743–753, **BILLS OF PARTICULARS**. As to general allegation of indebtedness on account, see § 131, **DEMURRER**. For statutes requiring copy to be pleaded, and sworn denial, see §§ 849–871, **DOCUMENES**.]

§ 767. Effect of failure to serve copy of account mentioned in pleading.	§ 768. Effect of serving copy. 769. Sworn account from abroad. 770. Disproving balance.
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§ 767. *Effect of failure to serve copy of account mentioned in pleading.*—The omission of a party to furnish on demand a copy of an account mentioned in his pleading, is not ground for excluding evidence, as matter of right, unless an order has been obtained before trial, precluding evidence because of the default.

Gebherd *vs.* Parker, 120 *N. Y.*, 33; s. c., 30 *State Rep.*, 180; 18 *Civ. Pro. R.*, 244, and cas. cit.

Moore *vs.* Belloni, 42 *N. Y. Super. Ct. (J. & S.)*, 184, 189.

[In *Schulhoff vs. Co-operative Dress Assoc.*, 3 *N. Y. Civ. Pro. Rep.*, 412, the Court say: "The Code provision as to precluding evidence applies only in case of a total want of service of a copy of the account. Defendant's remedy was to apply for an order for a further account, in place of the defective one.]

Compare *Tuttle vs. Wilson*, 42 *Minn.*, 233; s. c., 44 *North West. Rep.*, 10. "The parties had stipulated that a copy of the items of an account, pleaded generally in the defendant's answer, should be given to the plaintiff within a stated time. *Held*, that the stipulation dispensed with the necessity for a demand, and that, upon default to furnish the account as stipulated, the defendant was subject to the statutory consequences, and "precluded from giving evidence thereof."

§ 768. *Effect of serving copy.*—Furnishing a copy of an account mentioned by a party in his pleading, when demanded under the statute, does not preclude him from explaining it by extrinsic evidence.

Graham vs. Harmon, 84 *Cal.*, 181; s. c., 23 *Pacif. Rep.*, 1097.

[For the rules as to the explanation of accounts, see BRIEF ON THE FACTS, § 45, etc., *Accounts*.]

§ 769. *Sworn account from abroad.*—Under a statute making accounts coming from another county or State evidence, when properly verified by affidavit, the declaration must show that the account is an account from another county or State, properly verified, and make proffer of it.

Hunter vs. Anderson, 1 *Heisk. (Tenn.)*, 1.

§ 770. *Disproving balance.*—Under a general denial in an action for a balance of an account where plaintiff

does not allege particulars, defendant may show any facts which disprove that a balance was due.

Quin *vs.* Lloyd, 41 *N. Y.*, 349, rev'g 1 *Sweeny*, 253.

Goodale *vs.* Central Nat. Bank of N. Y., 16 *N. Y. Weekly Dig.*, 364. (In an action for the balance of an account for money had and received under such denial defendant may prove plaintiff's liability as indorser upon notes given in renewal of notes discounted for plaintiff, and placed to his credit.)

ACCOUNT STATED. [For rules where this is the cause of action or the defence, see TRIAL EVIDENCE.]

§ 771. Must be pleaded as such.

§ 773. Evidence under general denial.

♥ 772. Effect of pleading.

§ 771. *Must be pleaded as such*.—To enable one to recover as upon an "account stated," he must declare upon it as such. If in his pleading he relies on the original transactions or the items included in the account, they are open to proofs by the adverse party.

McCormick Harvesting Mach. Co. *vs.* Wilson, 39 *Minn.*, 467; s. c., 40 *N. W. Rep.*, 571.

s. p., Greenfield *vs.* Mass. Life Ins. Co., 47 *N. Y.*, 430; and see note in 24 *Abb. New Cas.*, 326; *Abb. Tr. Ev.*, 458.

[As to pleading both in separate counts, see §§ 705, etc.]

§ 772. *Effect of pleading*.—If one pleads only an account stated, or an adjustment of and promise to pay a previously unliquidated demand, he cannot, on failure to establish it, rely on the original transaction or items, unless alleged by him as a cause of action.

Saville *vs.* Ætna Ins. Co., 8 *Mont.*, 419; s. c., 3 *L. R. Ann.*, 542.

Volkening *vs.* De Graaf, 81 *N. Y.*, 268, aff'g 44 *Super. Ct. (J. & S.)*, 424.

§ 773. *Evidence under general denial.*—Under a general denial in an action upon an account stated, defendant may give any evidence tending to disprove the settlement of the account,¹ or may show that the account in plaintiff's name was in fact an account with a third person.² But he cannot show under such a denial that the account was false or erroneous;³ nor can he show any errors which he has not alleged.⁴

¹ Field *vs.* Knapp, 108 N. Y., 87.

² *Id.*

³ Fuller *vs.* Board of Commrs., etc., 2 Kan., 445. (Suit on county treasurer's bond. Petition alleged the execution of the bond, a default, and a settlement of the accounts between the board and the treasurer. *Held*, evidence offered under a general denial that certain items of the account as shown in the record of the settlement were not correct or just, was properly rejected.)

See also authorities below.

*Barker *vs.* Hoff, 52 How. Pr. (N. Y.), 382. (Reply to account set up in answer.)

Stoughton *vs.* Lynch, 2 Johns. Ch. (N. Y.), 209.

s. P., Leacycraft *vs.* Dempsey, 15 Wend. (N. Y.), 83.

ACCOUNTING.

§ 774. *Particulars of the account admissible under general allegation.*—In an equitable action for an accounting, plaintiff's evidence as to the particulars of the account is not to be excluded merely because alleged generally in the complaint; but amendment to conform to the facts proved is allowable.

Crosby *vs.* Watts, 41 N. Y. Super. Ct. (J. & S.), 208.

(In an action for accounting, no stringent rule will be applied to the statement of the plaintiff's claim, as it would be liable to prevent an accounting, because a discovery is a part of the theory of the action; and where it appears that the defendant while acting in a fiduciary capacity has, by untrue statements, led his principal to

incorrectly describe in his complaint the nature or extent of the transaction, respecting which he calls his agent to account, the defendant cannot deprive him of his remedy by disclosing on the trial his own wrongful acts, and taking technical advantage of them to defeat justice. In such cases the Court will permit the complaint to be amended, to conform it to the facts proved.)

• *West vs. Brewster*, 1 *Duer* (N. Y.), 647. (Motion to make more definite, etc., denied.)

ACTION PREMATURE. [For DEMURRER, see §§ 124, 213, etc.¹

§ 775. *Necessity of pleading the objection.*—The fact that the action was not prematurely commenced may be shown under a general denial.

Mack vs. Burt, 5 *Hun* (N. Y.), 28. (The ground of the decision is that a general denial enables defendant to disprove whatever plaintiff is required to prove to make out his case.) [But is plaintiff required always to prove the date of commencing his action, so as to show it was not premature? Prematurity is clearly provable under a denial, if the complaint purports to show the action was not premature.]

s. P., *Hotchkiss vs. Judd*, 94 *Mass.* (12 *Allen*), 447. (Holding the count demurrable.)

Landis vs. Morrissey, 69 *Cal.*, 83. (Action to recover for goods sold and delivered. *Held*, that under a general denial it was error to exclude testimony that the goods were sold upon a credit, the period of which had not expired when the action was commenced. This is not new matter, admitting and avoiding the cause of action. [Citing *Coles vs. Soulsby*, 21 *Cal.*, 50; *Gould's Pl.*, c. 3, § 195; *Frisch vs. Caler*, 21 *Cal.*, 71; *Hawkins vs. Borland*, 14 *Cal.*, 413; *Claffin vs. Baere*, 28 *Hun* (N. Y.), 204; *Wilder vs. Colby*, 134 *Mass.*, 377.]

Compare *Reed vs. Inhabitants of Scituate*, 89 *Mass.* (7 *Allen*), 141. (Holding that if the count is general, the objection that the cause was prematurely brought must be specially pleaded, or evidence in support of it is not admissible.)

Compare, also, *McConnico vs. Stallworth*, 43 *Ala.*, 389. (Holding the general issue denies the cause of action as set forth, and does not extend to any disability of the

plaintiff to bring the suit, nor to the objection that any specified time, before which the suit cannot be brought, has not elapsed.)

ADEQUATE REMEDY EXISTING AT LAW. [As to DEMURRER, see § 110, etc.]

§ 776. *Facts showing adequate remedy at law.*—In an equitable action, facts showing that plaintiff had an adequate remedy at law cannot be proved as a ground for defeating the action, unless alleged in pleading.

Holmes vs. Dole, *Clarke* (N. Y.), 71; Truscott vs. King, 6 N. Y., 147, rev'g 6 Barb., 346; Bell vs. Spotts, 40 N. Y. Super. Ct. (J. & S.), 552, aff'g 50 How. Pr., 162.
s. p., Town of Mentz vs. Cook, 108 N. Y., 504; s. c., 13 N. Y. State Rep., 845.

Whether the objection can avail as matter of right in any case where it is not pleaded, is questioned.

In *Wheelock vs. Noonan*, 108 N. Y., 179; s. c., 13 N. Y. State Rep., 110, the Court says: "If it [the objection] arises upon the facts stated in the complaint, it can scarcely be said to be new matter required to be stated in the answer, and I doubt whether, under the present system of pleading, the objection in such case is good."

Nor would it seem, by simply answering to the merits alone, and omitting to plead that there was adequate remedy at law, the defendant would thereby waive his right to a trial by jury, and be precluded from demanding such a trial at the opening of the case before the taking of any evidence. [*N. Y. Code Civ. Pro.*, § 1009. This section, in enumerating the ways in which a trial by jury may be waived, does not specify that it would be waived by not demanding such trial in the answer.]

De Bussiere vs. Halladay, 4 Abb. N. C., 111; s. c., 55 How. Pr. (N. Y.), 210. (*Held*, that the objection can be taken at the trial, if interposed before any evidence on the merits has been received.)

ADVERSE CLAIM.

§ 777. *Formal allegation not always sufficient.*—A plaintiff's allegation that a defendant has, or claims, some interest in the premises which had accrued subse-

quent to the plaintiff's, does not let in evidence that he claims an interest under an apparent right or title prior to plaintiff's, but that it is subordinate to plaintiff's, because plaintiff was a *bona-fide* purchaser without notice.

To litigate that question, plaintiff should deny notice, and state the necessary facts to entitle him to protection as a *bona-fide* purchaser.

Bank of Orleans vs. Flagg, 3 *Barb. Ch.*, (N. Y.), 316.

S. P., *Hetfield vs. Newton*, 3 *Sandf. Ch.* (N. Y.), 564.

(Holding that under this allegation, and the defence of usury being set up by the defendant, evidence for the plaintiff, that the defendant had taken a conveyance expressly subject to the mortgage and assuming to pay it, was not admissible for the purpose of cutting off the defence of usury, but only in order to show that such defendant claimed an interest in the premises.)

ADVERSE POSSESSION. [As to proving it under a denial of title, see **TITLE**, below.]

§ 778. *Under whom claiming.*—In an allegation of adverse possession by occupancy, under a specified person, the name or identity and constructive possession of the latter is material; and evidence that another person is in possession is not admissible.

Porter vs. McGrath, 41 *N. Y. Super. Ct. (J. & S.)*, 84, 102.

AGENCY. [See also **AUTHORITY**; **CAPACITY**; **CONSPIRACY**; **CONTRACT**; **DOCUMENT**; **RATIFICATION**.]

§ 779. Allegation of act lets in agency § 780. — terms of agency.

or confederacy by which it was done. 781. Denial lets in disproof of authority.

§ 779. *Allegation of act lets in agency or confederacy by which it was done.*—An allegation that the party did an act,—whether it be in the nature of contract,¹ fraud,²

trespass,³ or any other act *in pais*,⁴—lets in evidence that he did it by an agent.

If in any such case it were otherwise, the allegation may be amended at the trial so as to state the agency.⁵

¹ Poole vs. Hintrager, 60 *Iowa*, 180.

Bibb vs. Bancroft (*Cal.*, 1889), 22 *Pacif. Rep.*, 484. (So holding, although the agency of the third person was merely ostensible.)

Even under the strict rules of common law, an allegation that a contract was made by the defendants, “their own proper hands being thereto subscribed,” would let in a contract subscribed in the hand of one, in the name of all, there being evidence of authority. Porter vs. Cummings, 7 *Wend. (N. Y.)*, 173.

² Bennett vs. Judson, 21 *N. Y.*, 238. (Fraud through agent.)

Curtis vs. Fay, 37 *Barb. (N. Y.)*, 64.

Livermore vs. Herschell, 3 *Pick. (Mass.)*, 33. (Allegation of false representations by several,—sustained by evidence that the representations were made by one, in pursuance of a combination and conspiracy between all; because an allegation that an act was done by several, lets in evidence that one did it and another instigated it.)

s. p., Tappan vs. Powers, 2 *Hall (N. Y.)*, 277.

³ See §§ 136, 168, DEMURRER, Agency.

⁴ Wolcott vs. Smith, 81 *Mass. (15 Gray)*, 537. (Holding that an answer alleging payment generally lets in evidence of payment through an agent; for alleging agency is unnecessary.)

s. p., Wolf vs. Foster, 13 *Kan.*, 116.

Meers vs. Stevens, 106 *Ill.*, 549. (Foreclosure. Defendant alleged that complainant made a usurious agreement to extend the mortgage. Held, proof that the extension was granted by persons acting as complainant’s agents, was proper.)

[Act of agent alleged as that of principal. § 137, DEMURRER.]

⁵ Santo vs. Maynard, 57 *Conn.*, 157.

Bennett vs. Judson, 21 *N. Y.*, 238.

§ 780. — *terms of agency.* — Where the complaint seeks to charge defendant as agent,—as for instance alleging that he has received money as plaintiff’s agent

which he has converted to his own use,—a general denial lets in evidence for defendant of the terms of the agency for the purpose of showing that he was not bound to pay them over.

Phoenix Mut. Life Ins. Co. vs. Walrath, 53 *Wisc.*, 669 ; 11 *Ins. L. J.*, 344. (Reversing judgment, for exclusion on the theory that a general denial only put in issue the receipt of the money and the conversion.)

§ 781. *Denial lets in disproof of authority.*—A general denial, and equally a denial of the agency of the person through whom the act of the defendant is alleged to have been done, lets in evidence that the supposed agent had no authority;¹ or that the authority once given him had been revoked, and notice given to plaintiff before the transaction in suit.²

And under the New Procedure it will let in evidence that he was assuming to act for both parties in the same transaction, so that his act was void upon equitable principles.³

¹ So also—in an action on a contract made by an apparent agent—of a denial on every allegation but the execution of the instrument. *Chambers County vs. Clews*, 21 *Wall.*, 317, 322.

See also *Merritt vs. Briggs*, 57 *N. Y.*, 651.

Where agency is a theory of law only, justifying a liability created by statute, an allegation of the facts contemplated by the statute is sufficient; and a denial of agency, without denying such facts, is not material. *Merrigan vs. English*, 9 *Mont.*, 113; s. c., 22 *Pacif. Rep.*, 454. (Mechanic's lien.)

² *Hier vs. Grant*, 47 *N. Y.*, 274, 281.

³ *N. Y. Central Ins. Co. vs. Nat. Protection Ins. Co.*, 14 *N. Y.*, 85. (Action on fire policy. DENIO, C. J., says: "As the courts are now constituted (under the Code), they apply legal and equitable rules and maxims indiscriminately. A defendant may have relief in an action

which formerly he could not defend at law, but as to which equity would have relieved him. Courts now inquire whether, taking into consideration all the principles of law and equity bearing upon the case, the plaintiff ought to recover." [Citing *Dobson vs. Pearce*, 12 N. Y., 157. Judgment reversed for refusal to nonsuit on this ground.])

[Later cases, not, perhaps, however, inconsistent with this, hold that where equitable relief, such as the cancellation of a voidable instrument or the reformation of a contract, is necessary as preliminary to a recovery, the facts constituting the ground for such equitable relief must be pleaded and the relief asked in the pleading.]

AMOUNT. [See also DAMAGES ; VALUE.]

§ 782. Indefinite allegation.

§ 784. Amending claim.

783. Variance from allegation.

§ 782. *Indefinite allegation*.—Where the adequacy or inadequacy of an amount is clearly inferable from an allegation indicating it only by comparison with something else, the objection that the precise sum has not been stated is waived by not raising it before trial.

Seeley vs. Engell, 13 N. Y., 542. (Action to recover a balance on a note. The answer alleged that the note "was by mistake given for a greater sum than was due from the maker to the payee, to wit, a sum sufficient to cancel the balance claimed.")

[As to evasive and argumentative allegations of amount, see § 139, DEMURRER.]

§ 783. *Variance from allegation*.—An allegation of a specified amount does not let in evidence of a larger amount.¹ It lets in evidence of the same or any smaller amount, and is to that extent supported;² unless the specific amount is essential, as where it determines the jurisdiction of the Court, or the sufficiency of a tender, or the identity of an obligation.

¹ *Chitt. Pl.* 16 *Am. ed.*, 393*.

² *Id.*

§ 784. *Amending claim.*—An amendment merely increasing the amount claimed does not add a new cause of action within the rule restricting the power to allow amendment at the trial.¹

As against a defendant who has defaulted, an amendment after the time to amend of course has passed, which adds a new cause of action or increases the amount, renders judgment irregular, but perhaps not void.²

¹ *Cooper vs. Mills Co.*, 69 *Iowa*, 350 ; s. c., 28 *North West. Rep.*, 633. (Such amendment allowable even after the statute of limitations has run. Here plaintiff at first claimed only \$20,000 as damages. Afterwards, an amended petition was filed claiming \$35,000 damages. It was insisted that the claim for all above the original amount claimed was barred by the statute of limitations. The Court say: "Actions for a tort must be brought within two years from the time the cause of action accrued. This action was brought within that time. The claim of \$35,000 is predicated upon the same cause of action for which the action was brought. The action not being barred, the plaintiff, if entitled to recover at all, is, we think, entitled to recover all the damages sustained within the amount claimed in her petition and amended petition.")

Price vs. Brown, 112 *N. Y.*, 677 ; s. c., more fully, in 21 *State Rep.*, 677, aff'g 5 *State Rep.*, 7. (Action for balance of trust funds. Amendment by striking out a credit may be allowed even by referee.)

s. p., *Lycoming Fire Ins. Co. vs. Billings*, 61 *Vt.*, 310 ; s. c., 17 *Atl. Rep.*, 715. Holding that a declaration on a note for \$350 might be amended on leave before trial, by alleging a note for \$600, afterwards reduced by indorsement to \$350, for this was not a change of the cause of action.)

Schultz vs. Third Ave. R. R. Co., 89 *N. Y.*, 242, rev'g 46 *Super. Ct. (J. & S.)*, 311. (Two counts claiming \$10,000 each and final prayer for \$20,000, will sustain verdict for \$15,000, though recovery allowed on one count only. Amendment allowable even on appeal.)

Knapp vs. Roche, 37 *N. Y.*, *Super. Ct. (J. & S.)*, 395 ;

rev'd, in part, in 62 *N. Y.*, 614. (Conversion : amendment increasing the amount demanded, allowable where both parties have given evidence in regard to the proposed increment, and only a general objection is made to the allowance, without claim of surprise.)

² *Carr & Hobson vs. Sterling*, 114 *N. Y.*, 558; rev'g 53 *Super. Ct. (J. & S.)*, 255.

[Otherwise after verdict unless new trial is granted. *Pharis vs. Gere*, 31 *Hun (N. Y.)*, 443.]

ASSIGNMENT. [See also **CONTRACTS** ; **DOCUMENT** ; **"DULY;"** **OWNERSHIP** ; **REAL PARTY IN INTEREST** ; and **TITLE**.]

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| <p>§ 785. Assignment must be proved, if alleged.</p> <p>786. Amendment setting up assignment.</p> | <p>§ 787. Assignment, etc., by plaintiff's assignor before assignment to plaintiff competent under denial.</p> |
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§ 785. *Assignment must be proved, if alleged.*—Under an allegation that the cause of action was assigned to plaintiff, evidence that the cause of action was not assigned, but arose between the parties to the action, is an entire failure of proof,¹ and is not admissible against objection.² It is not, however, necessary to prove that the assignment was made in the precise manner³ alleged, if the adverse party has not been misled.

¹ *Curtiss vs. Marshall*, 8 *Bosw. (N. Y.)*, 22, cited (by Prof. Dwight, Com'r) in *Place vs. Minister*, 65 *N. Y.*, 89–102, as illustrating the rule.

[For the rule in case of conversion see *Whittaker vs. Merrill*, 30 *Barb. (N. Y.)*, 389 (that plaintiff cannot, on a complaint charging conversion of personal property after its assignment to him, recover for conversion before its assignment. The case is not that of a variance, but the causes of action are entirely distinct); and *Sherman vs. Elder*, 24 *N. Y.*, 381 (holding that an assignment of all claims and demands for the property, however, passes the right of action for a prior conversion). See also 1 *Abb. New Pr. & F.*, 517.]

Avery vs. N. Y. Cent. & H. R. R. Co., 106 *N. Y.*, 142; *s. c.*, 12 *N. East. Rep.*, 619; 7 *Cent. Rep.*, 795.

Garrigue vs. Loescher, 3 *Bosw.* (N. Y.), 578.

Bamberger vs. Terry, 103 *U. S.*, 40, 43.

Ladd vs. Pigott, 114 *Ill.*, 647; s. c., 1 *West. Rep.*, 347.

N. Y., L. E. & W. R. Co. vs. McHenry, 17 *Fed. Rep.*, 414; 16 *Rep'r*, 195.

Compare O'Neill vs. N. Y. Central R. Co., under next section.

- * Read vs. Bank of Attica, 55 *Hun* (N. Y.), 154; s. c., 28 *State Rep.*, 651; 8 *N. Y. Supp.*, 364. (An answer by a bank sued for the amount of a deposit, to the effect that the plaintiff is not the owner or in possession of the certificate of deposit, but has transferred the same to a third person, who has possession and claims to be the owner of it, will not admit the defence that such third person was the owner of the funds deposited, and the plaintiff simply acted as her agent.)

Garrigue vs. Loescher, 3 *Bosw.* (N. Y.), 578.

- * Bowman vs. Keleman, 65 *N. Y.*, 598.

Read vs. Jaudon, 35 *How. Pr.* (N. Y.), 303. (Under a complaint alleging a demand which accrued jointly to plaintiff and a third person, and an assignment thereof to plaintiff, he may recover on proving a claim which accrued to the third person alone, and was assigned by him.)

Cochran vs. Scott, 3 *Wend.* (N. Y.), 229. (In deriving title through a firm, not parties, it is not necessary to set out their names.)

Archibald vs. Mutual Life Ins. Co., 38 *Wisc.*, 542. (Averment of an assignment to H., and proof that it was to H. & Co., but that H. had become sole owner, is an immaterial variance.)

s. p., Doty vs. Rigour, 9 *Ohio St.*, 519.

Compare Burns vs. Iowa Homestead Co., 48 *Iowa*, 279. (Holding the contrary where issue was taken and objection made on this point.)

§ 786. *Amendment setting up assignment.*—An amendment setting up an assignment of the cause of action is allowable at the trial if the claim or defence is not thereby substantially changed.

O'Neill vs. N. Y. Central, etc., R. R. Co., 60 *N. Y.*, 138; rev'g 3 *Supm. Ct. (J. & S.)*, 99. (Holding, in action against a carrier for the loss of goods, it was substantially the same claim, whether plaintiff was owner at the time of loss, or had acquired this right of action by

assignment from the person with whom he had agreed to purchase the goods, by paying for them after loss, and that an amendment setting up the assignment was allowable in the discretion of the Court.)

Compare *Barron vs. Walker*, 80 *Ga.*, 121. (Complaint on account. *Held*, that, the declaration and bill of particulars representing an account between plaintiff and defendant, an amendment alleging that plaintiff sues as transferee of a third person is not allowable. It is a different cause of action.) [S. P., cases under last section.]

§ 787. *Assignment, etc., by plaintiff's assignor before assignment to plaintiff, competent under denial.*—If plaintiff alleges accrual of the cause of action to a third person, and assignment thereof by him to plaintiff, a denial lets in evidence that before the alleged assignment to plaintiff the claim was extinguished,¹ or assigned to a third person.²

¹ *Jones vs. McGee*, 7 *N. Y. Weekly Dig.*, 97. (Arbitration and award on the claim, made before the alleged assignment, and extinguishing it.)

Browning vs. Marvin, 22 *Hun (N. Y.)*, 547. (Assignment to plaintiff by firm. Denial lets in evidence that one of the firm had assigned in bankruptcy before the assignment to plaintiff.)

² *Donai vs. Metropolitan Elev. R. R. Co.*, 14 *N. Y. State Rep.*, 264; s. c., 47 *Hun*, 635; s. c., as *Douai vs. The same*, 28 *N. Y. Weekly Dig.*, 111. (Prior general assignment executed by plaintiff's assignor.)

Nanson vs. Jacob, 93 *Mo.*, 331; 12 *West. Rep.*, 358, 364; s. c., 6 *S. W. Rep.*, 246. (Here the denial was coupled with an allegation that plaintiff was not the real party in interest.)

Contra, *Brett vs. First Universalist Society of Brooklyn*, 63 *Barb. (N. Y.)*, 610. (Excluding evidence that a receiver of the assignor's property was appointed before assignment. Well said, by Mr. Pomeroy, to be manifestly incorrect. *Pom. on Remedies*, 676, n. I. See 15 *Abb. Pr. (N. S.)*, 421; s. c., 5 *Daly (N. Y.)*, 244.)

ASSOCIATION OR JOINT-STOCK COMPANY. [See also CAPACITY TO SUE; and CORPORATION.]

§ 788. *General denial puts existence in issue.*—Under a general denial in an action by or against an association of seven or more persons, under the statute,¹ the existence of the association is put in issue.²

¹ *N. Y. Code Civ. Pro.*, § 1919, allowing unincorporated associations of seven or more persons to sue and be sued by their president; and see note in 4 *Abb. N. C. (N. Y.)*, 300.

² *Brooks vs. Farmers' Creamery Asso.*, 21 *N. Y. Weekly Dig.*, 58. (*So held* where there was a direct allegation that defendant was an association, but omission to name any officer, as contemplated by the statute.)

Saltsman vs. Shults, 14 *Hun (N. Y.)*, 256. (*So held* where the complaint alleged that the defendant was treasurer of a joint-stock association, known as, etc., consisting of more than seven shareholders, but did not otherwise allege the existence of the association.)

Tiffany vs. Williams, 10 *Abb. Pr. (N. Y.)*, 204. (In a complaint in an action brought by an officer of a joint-stock company, the allegation that the company is a joint-stock company or association, consisting of more than seven shareholders or associates, is an issuable allegation. Demurrer to answer.)

AUTHORITY. [See also AGENCY; CAPACITY TO SUE; RATIFICATION.]

§ 789. Allegation of act by agent imports his authority. § 790. Ratification.

§ 789. *Allegation of act by agent imports his authority.*—An allegation or admission that a corporation by its officers executed and delivered the instrument sued on, includes the authority of the officers to do so for the corporation.

Pugh vs. Fairmount Gold & Silver Mining Co., 112 *U. S.*, 238; s. c., 28 *Law. ed.*, 684. (Holding therefore that

plaintiff could rely on the admission, and was not bound to prove the authority.)

To same effect, *Merrill vs. Consumers' Coal Co.*, 114 *N. Y.*, 216, 220; s. c., 23 *State Rep.*, 114.

s. p., *Partridge vs. Badger*, 25 *Barb. (N. Y.)*, 146.

Board of Education vs. Greenebaum, 39 *Ill.*, 609.

But an allegation that the president of the corporation "signed" an instrument is not an allegation of his authority to sign. *Gallatin Nat'l Bank vs. Nashville, Chattanooga, etc., R. R. Co.*, 4 *N. Y. State Rep.*, 714.

In *Smith vs. Hall*, 5 *Bosw. (N. Y.)*, 319, the complaint alleged the indorsement of a note by a corporation to the plaintiff, and the answer denied the indorsement, and alleged that the note was transferred by some officer of the corporation when it was insolvent, etc. *Held*, that this let in evidence on behalf of defendant that such officer had not authority.

But a denial of making the contract sued on by a corporation does not let in evidence of defects in the organization of the corporation. *Independent Order of Mut. Aid vs. Paine*, 122 *Ill.*, 625; s. c., 11 *West Rep.*, 701. (Pleas of *non assumpsit* and *non est factum*.)

§ 790. *Ratification*.—An allegation of authority lets in evidence of subsequent ratification.

Hoyt vs. Thompson, 19 *N. Y.*, 207.

Hoosac Mining, etc., Co. vs. Donant, 10 *Colo.*, 529; s. c., 16 *Pacif. Rep.*, 157.

s. p., *Janney vs. Boyd*, 30 *Minn.*, 319. (Holding the variance immaterial.)

Clark vs. Van Riemsdyk, 9 *Cranch (U. S.)*, 153. (Holding that in answer to a bill in equity, a denial that one had authority to draw a bill is not evidence that there was no subsequent assent thereto.)

BONA-FIDE PURCHASER. [See also **ADVERSE CLAIM; FRAUD; NOTICE.**]

§ 791. *General denial*.—A general denial does not let in evidence that the party was a *bona-fide* purchaser for value without notice,¹ unless the complaint is so framed as to charge him affirmatively with fraud on the purchase, in which case a denial may be enough.²

¹ *Abb. Tr. Ev.*, 715.

Weaver *vs.* Borden, 49 *N. Y.*, 286, rev'g 3 *Lans.*, 338.

S. P., Seymour *vs.* McKinstry, 106 *N. Y.*, 230; 9 *Cent. Rep.*, 823. (Action on a vendor's lien.)

S. P., Boone *vs.* Chiles, 10 *Pet. (U. S.)*, 177, 211 (stating the requisites of the pleading); and *Sugden on Vend. and Purch.*, 1087, etc.

Same rule continues under the New Procedure. Weber *vs.* Rothchild, 15 *Or.*, 385; *s. c.*, 15 *Pacif. Rep.*, 650.

S. P., Bassick Min. Co. *vs.* Davis, 11 *Colo.*, 130; *s. c.*, 17, *Pacif.*, 294.

² Hennequin *vs.* Butterfield, 43 *Super. Ct. (J. & S.)*, 411; aff'd 76 *N. Y.*, 598. (Here the complaint alleged a fraudulent hypothecation of plaintiff's securities to defendants. *Held*, that the action proceeded on the theory, as against plaintiffs, that defendants were not *bona-fide* holders of the securities, and the latter could show, under a denial of the alleged fraudulent hypothecation, that they were *bona-fide* holders for value.)

For the distinction between the cases of an assignee and a purchaser under the recording act, see Seymour *vs.* McKinstry, 106 *N. Y.*, 230; 9 *Cent. Rep.*, 823.

BY-LAWS. [And see ORDINANCES.]

§ 792. *Pleading legal effect.*—A pleading stating a by-law according to its legal effect, lets in the by-law in evidence, although the exact language be not used.

Kehlenbeck *vs.* Logeman, 10 *Daly (N. Y.)*, 447.

CAPACITY. [See also AGENCY; AUTHORITY; ASSOCIATION; CORPORATION; "DULY;" and MISNOMER.]

§ 793. *Incapacity must be pleaded.*—Where plaintiff's pleading contains no allegation as to his capacity to sue, his lack of legal capacity to sue cannot be objected to at the trial unless specially pleaded.¹

Where incapacity appears on the face of the complaint, the objection is waived if not taken by demurrer, and cannot be raised at the trial.²

- ¹ *Phillips vs. Goldtree*, 74 *Cal.*, 151; s. c., 13 *Pacif. Rep.*, 313. (Partnership acting under fictitious firm name.)
Sullivan vs. Honacker, 6 *Fla.*, 372. (Executors and administrators.)
Perkins vs. Stimmel, 114 *N. Y.*, 359; 23 *State Rep.*, 657; 17 *Civ. Pro. R.*, 25. (Action by a general guardian of an infant. Objection that it should have been in the name of the infant by a guardian *ad litem*.)
Kilpatrick vs. Dean, 4 *N. Y. Supp.*, 708, aff'g 3 *N. Y. Supp.*, 60. (Objection that plaintiff, as general assignee, had not filed a bond.)
Jemison vs. Kenedy, 55 *Hun.*, 47; s. c., 26 *N. Y. State Rep.*, 469; 7 *N. Y. Supp.*, 296. (Indian not suing by the attorney of his nation.)
Royce vs. Vandeusen, 49 *Vt.*, 26. (Married woman.)
Palmer vs. Davis, 28 *N. Y.*, 242. (Coverture :) [before the incapacity was removed.]
Meyer vs. Lane, 40 *Kans.*, 491; s. c., 20 *Pacif. Rep.*, 258. (Infancy.)
Hoyt vs. Hoyt, 58 *Vt.*, 538; s. c., 4 *East. Rep.*, 456. (Insanity of plaintiff not available, though raised by plea in equity, because incapacity to sue must be objected to by answer.)
² *N. Y. Code Civ. Pro.*, §§ 498, 499; *Palmer vs. Davis*, 28 *N. Y.*, 242.

At common law, if plaintiff's legal capacity to sue is well pleaded in the complaint, a general denial lets in evidence of his want of such capacity. See 1 *Chitt. Pl.*, 16 *Am. ed.*, 517, and *Mills vs. Knapp*, 39 *Fed. Rep.*, 592. [Under the New Procedure, in some cases this rule is modified by statutes requiring a specific denial, or that the fact should be specially pleaded, especially as to corporations. *N. Y. Code Civ. Pro.*, §§ 1775, 1776.]

CONSENT. [See also CONTRACTS.]

§ 794. *General allegation*.—An allegation that an act was done “with the consent” of the party is sufficient to admit evidence.

Horton vs. Brownsey, 10 *N. Y. State Rep.*, 800. (Nuisance. Here the allegation was that he acted “with the consent, by license, lease or otherwise,” of C. *Held*,

sufficient to admit proof, especially in the absence of a motion to make it more definite.)

[General allegation and denial form material issue, see § 159, DEMURRER.]

CONSPIRACY. [See also FRAUD.]

§ 795. May be proved, though not alleged.

§ 796. Variance.

§ 795. *May be proved though not alleged.*—In an action for damages, fraud and deceit, conspiracy, although not alleged, may be proved for the purpose of connecting a defendant with the fraud, where otherwise he would not be implicated.

Brackett *vs.* Griswold, 112 *N. Y.*, 454; s. c., 21 *State Rep.*, 791. (So holding after verdict, but reversing judgment upon another ground. ANDREWS, J., says: "These principles are well settled. The opinion of Chief Justice Nelson in *Hutchins vs. Hutchins* (7 *Hill* (*N. Y.*), 104) contains an elaborate consideration of the subject, and no other authority need be cited.")

s. P., Stubly *vs.* Beachboard, 68 *Mich.*, 401; s. c., 13 *West. Rep.*, 71, 79; s. c., 36 *N. West. Rep.*, 192. (Holding that conspiracy may be proved if the facts constituting it are alleged and the proper relief sought, although conspiracy is not expressly charged as such.)

[*Contra* in equity. *Story Eq. Pl.*, 24, says: "If a combination or confederacy is meant to be relied on as a ground of equitable jurisdiction, it can be only in special cases; and then it must be specially and not generally charged, to justify an assumption of jurisdiction." Citing *Mitf. Eq. Pl.*, by Jeremy, 41.]

§ 796. *Variance.*—A variance between allegation and proof as to which defendant was principal,¹ or as to the mode in which a fraud was carried out,² is not fatal.

¹ *Piatt vs. Longworth's Devisees*, 27 *Ohio St.*, 159. (Bill charging conspiring to defraud plaintiff. *Held*, that to constitute a variance, the difference must be as to the substantial elements of the case, and not as to the pleader's legal conclusions.)

² *Place vs. Minster*, 65 N. Y., 89. (Allegation of fraudulent representations: proof of concealment. Variance held not to justify dismissal.)

CONTRACTS. [See also ABBREVIATIONS; AGENCY; ASSIGNMENT; CONSENT; DAMAGES; DATE; DELIVERY; DEMAND; DOCUMENT; "DULY;" ILLEGALITY; MUTUAL DEALINGS; NOTICE; OWNERSHIP; PAYMENT.]

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| <p>§ 797. General allegation lets in writing.</p> <p>798. Allegation of writing may let in oral.</p> <p>799. General allegation, and special contract.</p> <p>800. Agreed price: and value.</p> <p>801. Allegation of execution.</p> <p>802. Contract signed by agent.</p> <p>803. Agent's authority.</p> <p>804. Agency or representative capacity.</p> <p>805. Legal effect.</p> <p>806. Variance by not alleging immaterial part.</p> <p>807. Alternative contract.</p> <p>808. Modification of contract.</p> <p>809. Conditions precedent, performed.</p> | <p>§ 810. — Breach, particulars.</p> <p>811. Evidence of breach limited by allegation.</p> <p>812. — excuse.</p> <p>813. Denials.</p> <p>814. — statute of frauds.</p> <p>815. — — admission of contract.</p> <p>816. Plaintiff's breach of condition precedent as a bar.</p> <p>817. — Denial; with specifications of breach.</p> <p>818. — want of consideration.</p> <p>819. — recoupment.</p> <p>820. Failure of consideration: Fraud: Abandonment.</p> <p>821. — concurrent admissions defect in writing.</p> <p>822. Defendant's breach: Excuse.</p> |
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§ 797. *General allegation lets in writing.*—To entitle a party to prove a written contract, it is not necessary to allege that the contract was in writing,¹ even where the statute of frauds requires a writing.²

Otherwise under statutes requiring written instruments relied on to be pleaded by copy or filing.³

¹ *Higgins vs. McDonnell*, 16 *Gray (Mass.)*, 386. (Warranty.)
McNees vs. Missouri Pac. Ry. Co., 22 *Mo. App.*, 224.
 (Motion to make more definite denied, because it was immaterial whether the contract was verbal or written.)
Hamilton vs. Lau, 24 *Nebr.*, 59; s. c., 37 *North West.*, 688.
Tuttle vs. Hannegan, 54 *N. Y.*, 686, aff'g 4 *Daly*, 92.
 Clearly so when the contract is only partly in writing.
Louisville, N. A. & C. R. Co. vs. Reynolds, 118 *Ind.*, 170; s. c., 20 *N. East.*, 711.

² *Fiedler vs. Smith*, 60 *Mass.* (6 *Cush.*), 336.

Pettit vs. Hamlyn, 43 *Wisc.*, 314.

S. P., §§ 166, 167, DEMURRER.

[*Contra*, *Petersen vs. Ochs*, 40 *Iowa*, 530.] Where writing is alleged, a seal need not be unless essential to its validity. *Jenkins vs. Pell*, 20 *Wend. (N. Y.)*, 450, aff'g 17 *id.*, 417. *Contra*, *McCrummen vs. Campbell*, 82 *Ala.*, 566; s. c., 2 *South. Rep.*, 482. Alleging a "deed" imports a seal. *Paige vs. People*, 3 *Abb. Ct. App. Dec. (N. Y.)*, 439.

§ 798. *Allegation of writing may let in oral.*—It is the better opinion that evidence of an oral contract should not be excluded merely because pleaded as if it were in writing, if not pleaded as if under seal.

Johnson vs. Hathorn, 2 *Abb. Ct. App. Dec. (N. Y.)*, 465, 469.

Thomas vs. Nelson, 69 *N. Y.*, 118.

[s. p., *Patterson vs. Keystone Min. Co.*, 30 *Cal.*, 360; *Nelson vs. Dubois*, 13 *Johns. (N. Y.)*, 175; *Hamilton vs. Gridley*, 54 *Barb. (N. Y.)*, 542.]

[*Contra*, *Duplantier vs. Michoud*, 19 *La. Ann.*, 530; *Hunter vs. McHose*, 100 *Pa. St.*, 38.]

[For cases as to the admissibility of a collateral oral stipulation, under an allegation of a written contract, see *Rhoads vs. Jones*, 95 *Ind.*, 341; *Ray vs. Bowles*, 83 *Mo.*, 166; *Hunter vs. McHose*, 100 *Pa. St.*, 38.]

Oral not admissible if pleaded as sealed. *Phillips, etc., Constr. Co. vs. Seymour*, 91 *U. S.*, 646, 655; *Irwin vs. Shultz*, 46 *Pa. St.*, 74 (common law). *Schaefer vs. Henkel*, 7 *Abb. N. C.*, 1; s. c., 75 *N. Y.*, 378; *Briggs vs. Partridge*, 64 *N. Y.*, 357; aff'g 39 *Super. Ct. (J. & S.)*, 339 (under New Procedure). Variance amendable. 4 *Abb. Tr. Ev.*, 522; *Bedford vs. Terhune*, 30 *N. Y.*, 453; s. c., 27 *How. Pr.*, 422. Failure to object waives the variance. *South Carolina R. R. Co. vs. Barrett*, 12 *S. C.*, 173; *Wolfe Creek, etc., Co. vs. Schultz*, 71 *Pa. St.*, 180.

§ 799. *General allegation, and special contract.*—Allegations of facts showing liability—as, for instance, on an implied contract for goods or services furnished—will let in plaintiff's evidence of a special contract and its performance.¹

A general denial will let in defendant's evidence of a special contract and non-performance.²

- ¹ *Castagnino vs. Balletta*, 82 *Cal.*, 250, and *cas. cit.*
s. p., *Tunnison vs. Field*, 21 *Ill.*, 108 ; *Pickard vs. Bates*,
38 *Id.*, 40 ; *Elder vs. Hood*, *Id.*, 533.
Scott vs. Congdon, 106 *Ind.*, 268 ; s. c., 6 *North East. Rep.*,
125.
Emslie vs. City of Leavenworth, 20 *Kans.*, 562.
Lovell vs. Earle, 127 *Mass.*, 546. (So holding even though
the amount due under the special contract was less than
that claimed in the account alleged.)
Farron vs. Sherwood, 17 *N. Y.*, 227 ; *Fells vs. Vestvali*,
2 *Keyes (N. Y.)*, 152 ; *Burling vs. Gunther*, 12 *Daly*
(*N. Y.*), 6.
s. p., *Farley vs. Browning*, 15 *Abb. N. C. (N. Y.)*, 301 ; s. c.,
1 *How. Pr. (N. S.)*, 307. (Holding that defendant's
admission in the answer, that plaintiff had done work
and furnished materials (there being a denial of value),
does not excuse him from proving that he had done all
the work required by the special contract produced in
evidence, nor preclude defendant from showing the
contrary.)
² *Manning vs. Winter*, 7 *Hun (N. Y.)*, 482. (Delivery of
only part agreed for.)
Ferguson vs. Rutherford, 7 *Nev.*, 385. (Error to exclude
evidence of other terms, or of deviation in performance,
whether offered to defeat the action or reduce damages.)
Warren vs. Ferdinand, 91 *Mass.* (9 *Allen*), 357. (Use and
occupation. Error to exclude defendant's evidence of
a lease.)
Marvin vs. Mandell, 125 *Mass.*, 562. (Action for deposit :
error to direct verdict for amount claimed, after evi-
dence that the money was by agreement applied in pay-
ment of advances previously made.)
Wall vs. Provident Inst., 85 *Mass.* (3 *Allen*), 96. (Action
for deposit. Denial lets in conditions and non-com-
pliance.)

§ 800. *Agreed price : and value.*—The variance between an allegation of facts with an express promise to pay a specified sum, and proof of the same facts as raising an implied promise to pay the fair value, without any express promise, may be disregarded,¹ or cured by immediate amendment.² If plaintiff at the trial relies solely on an express promise, defendant cannot under a denial give evidence that the value was less,³ unless in a direct conflict of testimony, such as to let in that evidence by way

of corroboration,⁴ or unless he claims that the contract was only for fair value, and gives evidence in support of that version.⁵ If plaintiff has alleged both, he may prove both or either.⁶

¹ *De La Guerra vs. Newhall*, 55 *Cal.*, 21.

Stokes vs. Taylor, 104 *N. C.*, 394; s. c., 10 *South East. Rep.*, 568. (Holding amendment unnecessary.)

Sussdorff vs. Schmidt, 55 *N. Y.*, 319. (Variance disregarded.)

Taylor vs. Pickney, 12 *N. Y. Civ. Pro. R.*, 107 n. [See also, s. p., *Giffert vs. West*, 33 *Wisc.*, 617; *Leopold vs. Vankirk*, 27 *Wisc.*, 152; 29 *Wisc.*, 548; *Chatfield vs. Frost*, 3 *N. Y. Supm. Ct. (T. & C.)*, 357.

[*Contra*, *Gammage vs. Alexander*, 14 *Tex.*, 414; *White vs. Leup's Adm.*, 55 *Wisc.*, 222. (Error to admit evidence of value, to support allegations of agreed price.)

² *Copeland vs. Johnson Mfg. Co.*, 19 *N. Y. State Rep.*, 212; s. c., 3 *N. Y. Supp.*, 42.

³ *Marsh vs. Holbrook*, 3 *Abb. Ct. App. Dec. (N. Y.)*, 176.

⁴ *Abb. Brief on Facts*, 109.

⁵ See §§ .

⁶ *Embry vs. Palmer*, 107 *U. S.*, 3, 14.

Stearns vs. Dubois, 55 *Ind.*, 257.

Packard vs. Reynolds, 100 *Mass.*, 153.

Hewitt vs. Brown, 21 *Minn.*, 163. (With *dictum* that such pleading is obnoxious to motion.) To same effect, *Am. Dock & Impr. Co. vs. Staley*, 40 *N. Y. Super. Ct. (J. & S.)*, 503.

Murphy vs. McGraw, 74 *Mich.*, 318; s. c., 41 *North West. Rep.*, 917.

§ 801. *Allegation of execution.*—An allegation of “making,” “executing,” “indorsing,” and the like, lets in evidence of delivery, and other formalities necessary to valid execution.

Garcia vs. De Satrustegui, 4 *Cal.*, 244.

Purdy vs. Vermilyea, 8 *N. Y.*, 346.

Robert vs. Good, 36 *N. Y.*, 408, 410. s. p., *DEMURRER*, § 164.

§ 802. *Contract signed by agent.*—If a contract is pleaded by legal effect, an allegation that the party made

the contract lets in the instrument, though signed by an agent.

Regents of University vs. Detroit Young Men's Soc., 12 *Mich.*, 138. (*Dictum.*)
S. P., § 150, etc., DEMURRER.

§ 803. *Agent's authority.*—In an action upon a contract made through an agent, a general denial lets in evidence that the alleged agent had no authority.

Dayton Ins. Co. vs. Kelly, 24 *Ohio St.*, 345. (Holding that an allegation in the answer that the agent and secretary of the defendant company had no authority to make the contract of insurance was not new matter requiring a reply, as it might be proved under a denial.)
S. P., § 168, DEMURRER.

§ 804. *Agency or representative capacity.*—A general denial to a complaint stating a transaction as had between the parties individually lets in evidence that they acted in a representative character, to disprove individual liability.

Koehler vs. Adler, 91 *N. Y.*, 657. (Action for a loan made by check. *Held*, that a general denial let in evidence that the parties were respectively treasurer and president of a corporation, and the plaintiff depositing and drawing the moneys in his own name; and that the check was given in the corporate business. [*Compare Ludwig vs. Gillespie*, 105 *N. Y.*, 653.])

Stark vs. McCloskey, 19 *N. Y. State Rep.*, 110; s. c., 2 *N. Y. Supp.*, 737. (Goods sold.)

See also DEMURRER, § 169.

[Of course the contract, if under seal, might exclude oral evidence.]

§ 805. *Legal effect.*—A contract sufficiently pleaded in general language or according to its legal effect is admissible in evidence, although its exact provisions or words have not been set forth.

Brown vs. Champlin, 66 *N. Y.*, 214, 219. (Recovery sustained on a bond, though the relations of the parties and nature of consideration were not alleged.)

Morse vs. Gilman, 16 *Wisc.*, 504. (Holding exclusion of evidence improper, although the complaint threw little light on the specific provisions of the contract.)

Swetland vs. Swetland, 3 *Mich.*, 482, 485, (adding "as in and by said, etc., when produced, will more fully appear,"—lets in omitted or variant parts.)

§ 806. *Variance by not alleging immaterial part.*—If the part of the contract material to the cause of action is substantially alleged, the contract when offered in evidence is not to be excluded because of including other provisions not affecting the alleged breach.

Blackstone Nat. Bank vs. Lane, 80 *Me.*, 165; s. c., 6 *N. Eng. Rep.*, 148; 13 *Atl. Rep.*, 683. (Memorandum on note that it was held as collateral security.)

Detroit, etc., R. R. Co. vs. Forbes, 30 *Mich.*, 165. (Independent stipulations.)

Scott vs. Leiber, 2 *Wend. (N. Y.)*, 479; *Williams vs. Healey*, 3 *Den. (N. Y.)*, 363; *N. P.*, 1818, *Denton vs. Bours*, *Anth. N. P.*, 241; *Hoad vs. Inman*, 4 *Johns. Ch. (N. Y.)*, 437; *Tomlinson vs. Miller*, 7 *Abb. Pr. N. S. (N. Y.)*, 364.

Brock vs. Knowler, 37 *Hun*, 609; s. c., 22 *N. Y. Weekly Dig.*, 510.

Piatt vs. Longworth, 27 *Ohio St.*, 159; *Gaines vs. Union, etc., Co.*, 28 *id.*, 418.

[See also, s. p., *Hoke vs. Wood*, 26 *Md.*, 453; *Stearns vs. Barrett*, 1 *Pick. (Mass.)*, 443; *Couch vs. Ingersoll*, 2 *id.*, 292; s. p., *Warne vs. Prentiss*, 9 *Mo.*, 544.]

At common law where a pleading purports to recite a specialty or a matter of record in *hæc verba* the adverse party can crave oyer, and if there was a slight misstatement could demur for variance. *Ferguson vs. Howard*, 7 *Cranch (U.S.)*, 408; *Bishop vs. Quintard*, 18 *Conn.*, 395.]

§ 807. *Alternative contract.* — An allegation of an absolute contract to do a specified thing does not let in evidence of an alternative contract to do either of two things or to perform in either of two methods, whether the alternative be at the option of the plaintiff or of the defendant.

Plaintiff should allege the alternative contract and the election made by himself, etc., or defendant's non-performance of both alternatives.

This, at least, is the rule at Common Law. *Stone vs. Knowlton*, 3 *Wend. (N. Y.)*, 374. (Allegation of contract to transport twenty tons. Proof of contract to transport fifteen or twenty. Variance held to justify nonsuit.)

Hatch vs. Adams, 8 *Cow. (N. Y.)*, 35. (Allegation of contract to pay specified rate of wages. Proof of contract to pay at different rates according as plaintiff should elect to board himself or board with the employer. Variance justified nonsuit.)

[See s. p., *Stanwood vs. Scovel*, 4 *Pick. (Mass.)*, 422; *Shepard vs. Palmer*, 6 *Conn.*, 95; *Bunell vs. Taintor*, 5 *id.*, 273.]

[But now the variance may frequently be disregarded.] Compare *Harmony vs. Bingham*, 12 *N. Y.*, 99; aff'g 1 *Duer*, 209. (Defendant covenanted to carry goods within a certain time, and to deduct from the freight for every day's default. *Held*, not alternative covenants, and a declaration by the owner to recover back freight paid under protest need only set forth the first, and aver a breach.)

Under the general issue at common law, a defendant who held the right of election may prove his election of the contrary alternative to that relied on by plaintiff. *Mosher vs. Rogers*, 117 *Ill.*, 446.

[As to pleading according to legal effect, see DEMURRER, § 171.]

§ 808. *Modification of contract.*—An allegation of an original contract does not let in evidence of its modification,¹ unless it be a mere extension of time.²

But an allegation of the contract as modified lets in evidence without having alleged the terms of the original contract, and in what particulars it was modified.³

The defence that the contract alleged by plaintiff as the ground of his action had been changed by agreement of the parties is an affirmative defence, which must be pleaded in order to let in evidence of the change.⁴

¹ *Lanitz vs. King*, 93 *Mo.*, 513 ; s. c., 6 *South West. Rep.*, 263 ; 12 *West. Rep.*, 248 ; *Henning vs. United States Ins. Co.*, 47 *Mo.*, 425.

Pharr vs. Bachelor, 3 *Ala.*, 237. (Where a contract has been substituted for another, the substituted contract should be declared on.)

Buchanan vs. Beck, 15 *Oreg.*, 563 ; s. c., 16 *Pacif. Rep.*, 422.

Tumbridge vs. Read, 3 *N. Y. Supp.*, 908 ; s. c., *Tunbridge vs. Read*, 22 *N. Y. State Rep.*, 764. (Error not cured by subsequent amendment to defeat motion for new trial.)

[The allegation might be amended if the evidence was received without objection. *Fallon vs. Lawler*, 102 *N. Y.*, 228, 233.]

s. p., *Salter vs. Ham*, 31 *N. Y.*, 321. (Complaint alleging partnership in original and in modified contract not sustained by proof of partnership in original contract only.)

² *Crane vs. Maynard*, 12 *Wend. (N. Y.)*, 408. (Holding that where the only breach is in the manner or fact of performance, and not as to the time of performance, plaintiff may prove without having alleged it a modification of the contract which merely extended the time of the performance for a period which expired before the action was brought, and may recover on the first agreement, although the agreement for extension contained also a superfluous stipulation to perform within the extended period.)

³ *White vs. Soto*, 82 *Cal.*, 654.

⁴ *Wallace vs. Blake*, 30 *N. Y. State Rep.*, 248.

Lanitz vs. King, 93 *Mo.*, 513. (General denial does not let in extension of time not alleged.)

s. p., *Tuskaloosa Cotton Seed Oil Co. vs. Perry*, 85 *Ala.*, 158 ; s. c., 4 *So. Rep.*, 635.

§ 809. *Conditions precedent, performed.*—A party seeking to enforce a contract cannot prove the performance of conditions precedent on his part, unless he has alleged it.

Edgerly vs. Farmers' Insurance Co., 43 *Iowa*, 587.

Snow vs. Johnson, 1 *Minn.*, 48. (Promise to pay a sum in goods when called for. Allegation of demand for

the money will not let in evidence of demand of the goods.)

§ 810. — *Breach, particulars.*—In those cases where a breach of condition relied on as a ground of forfeiture ought to be alleged in detail,¹ a general allegation of breach will not let in evidence.²

¹ Section 193, DEMURRER.

² *Dictum* in *Jennings vs. Grand Trunk Ry. Co.*, 52 *Hun*, 227, 232; s. c., 23 *N. Y. State Rep.*, 15; 5 *N. Y. Supp.*, 140. (Carrier's defence of breach of printed conditions on way-bill. Allegation "that the notices required by said agreements were never given as thereby required," deemed insufficient to enable defendant to show that the notice was too late.)

In *Weed vs. Schenectady Ins. Co.*, 7 *Lans. (N. Y.)*, 452, the Court were divided on a similar question. [The better opinion is that if the evidence was received without objection, and was not otherwise competent, the objection is waived.]

§ 811. — *Evidence of breach limited by allegation.*—A sufficient allegation of a breach lets in evidence of any specific act or omission which falls within the scope of the allegation.¹

But if with an allegation of breach even as broad as the contract is coupled a specification of particular breaches as a part of the same assignment the evidence is limited to instances within those specifications, and the general allegation does not let in others not within those specifications.²

¹ *Trimble vs. Stilwell*, 4 *E. D. Smith (N. Y.)*, 512, 515. (Building contract. Allegation that the work was not done in proper manner, sufficient at the trial to let in evidence of specific defect.)

s. p., *Thompson vs. Thompson*, 79 *Me.*, 286; 4 *N. Engl. Rep.*, 487; 9 *Atl. Rep.*, 888. (Divorce: Evidence of failure to provide medicine, admissible under allegation of failure to support.)

² *Reed vs. Hayt*, 51 *N. Y. Super. Ct. (J. & S.)*, 121, aff'd in 17 *State Rep.*, 137. (Allegation that "plaintiff has not duly performed all the conditions on his part, but on the contrary," etc., thereupon proceeding to enumerate certain things which it was alleged showed that all the conditions had not been performed. *Held*, that this only put in issue the particular breaches specifically referred to.)

1 *Chit. Pl.*, 16 *Am. ed.* *345. (Defendant had not used the farm in a husbandlike manner, "but on the contrary had committed waste," does not let in evidence of misconduct not amounting to waste.)

Otherwise where the general allegation of non-performance and the specific instances of breach are separately stated in such manner as to give the adverse party fair notice that the general allegation is not merely formal and introductory to the specification. See, for illustration, *Trimble vs. Stilwell*, 4 *E. D. Smith (N. Y.)*, 512, 515.

§ 812. — *excuse*.—A complaint on an express contract, alleging plaintiff's performance, does not let in evidence of an excuse for plaintiff's non-performance.¹ Nor under such complaint can excuse be shown in rebuttal,² where plaintiff's non-performance is set up as a defence.

But amendment may be allowed so as to let in the evidence, if the adverse party is not thereby materially injured.³

Where it is permissible to disregard the express contract, and sue upon an implied one, the express contract and excuse for its non-performance, although not alleged, may be given in evidence in support of such an action,⁴ or in rebuttal, if the express contract and its non-performance is set up as a defence.⁵

¹ *Purdue vs. Noffsinger*, 15 *Ind.*, 386.

Bernhard vs. Washington Life Ins. Co., 40 *Iowa*, 442.

s. p., *Fauble vs. Davis*, 48 *Iowa*, 462.

Colt vs. Miller, 64 *Mass.* (10 *Cush.*), 49.

s. p., *Palmer vs. Sawyer*, 114 *Mass.*, 1, 14.

Oakley vs. Morton, 11 *N. Y.*, 25.

s. p., *Crandall vs. Clark*, 7 *Barb. (N. Y.)*, 169.

Baldwin *vs.* Munn, 2 *Wend.* (N. Y.), 399 ; s. c., 20 *Am. Dec.*, 627.

[*Contra*, Maddox *vs.* German Ins. Co., 39 *Mo. App.*, 198 ; s. p., St. Louis, etc., Ventilating Co. *vs.* Bissell, 41 *id.*, 426.]

[The rule is otherwise of excuse for not tendering where tender is not a part of the contract. See TENDER, hereafter ; *Abb. Tr. Ev.* (N. Y.), 727.]

[Otherwise also of a statutory excuse if the Court may take judicial notice of it, for it qualifies the contract itself. Baxter *vs.* Brooklyn Life Ins. Co., 44 *Hun* (N. Y.), 184.

* Eiseman *vs.* Hawkeye Ins. Co., 74 *Iowa*, 11 ; s. c., 17 *Ins. L. J.*, 843.

Boon *vs.* State Ins. Co., 37 *Minn.*, 426 ; s. c., 34 *North West. Rep.*, 902. (Holding that a reply setting up an excuse is a departure.)

s. p., Potts *vs.* Land Co., 47 *N. J. L.*, 476.

Compare Trainor *vs.* Worman, 33 *Minn.*, 184 ; s. c., 25 *North West. Rep.*, 401. (Here the complaint alleged performance: the answer set up a counterclaim for non-performance. Plaintiff by his reply pleaded a waiver of performance. *Held*, that plaintiff could not recover without proving performance ; nevertheless evidence of a waiver was admissible to defeat the counterclaim.)

* Hosley *vs.* Black, 28 *N. Y.*, 438 ; s. c., 26 *How. Pr.*, 97 ; s. p., Dauchy *vs.* Tyler, 15 *How. Pr.* (N. Y.), 399 ; Lefler *vs.* Sherwood, 21 *Hun* (N. Y.), 573.

* See §§ 799, 800 as to allegation of an implied and proof of an express contract.

* Wolfe *vs.* Howes, 20 *N. Y.*, 197.

s. p., Lord *vs.* Wheeler, 67 *Mass.* (1 *Gray*), 282.

But where a party for a collateral purpose proves a contract not pleaded and non-performance of it,—as where its performance was to be the consideration for the note sued on,—the other can prove a waiver not pleaded. Chamberlain *vs.* Painesville, etc., R. Co., 15 *Ohio St.*, 225.

Compare Little *vs.* Mercer, 9 *Mo.*, 216. (Holding that wrongful prevention of performance of a sealed contract does not entitle plaintiff to recover on a *quantum meruit* for non-performance ; questioning Linningdale *vs.* Livingston, 10 *Johns.* (N. Y.), 36.)

§ 813. *Denials*.—Under a general denial of a complaint alleging a contract,¹ or a denial of the contract set

forth in the complaint,² the contract really made, or the part which differs from that alleged, is admissible.

Such denial lets in evidence that the contract was never delivered.³

¹ *Hebbard vs. Haughian*, 70 *N. Y.*, 54.

Dietrich vs. Dreutel, 43 *Hun* (*N. Y.*), 342. (Arrangements under which dealings between the parties were carried on prior to the time of the sale of goods for which the action was brought, and that no new arrangements were made as to subsequent dealings.)

Gove vs. Wooster, *Hill & D. Supp.*, 30. (Inversion of place of covenant by mistake of scrivener.) And see DENIAL.

Taylor vs. Ballard, 17 *N. Y. State Rep.*, 598. (Evidence that the agreement was not to purchase the quantity alleged, but only so much of it as was good.)

² *Marsh vs. Dodge*, 66 *N. Y.*, 533, rev'g 4 *Hun*, 278; s. c., 6 *Supm. Ct. (T. & C.)*, 568. (Action for royalties under a license for the manufacture and sale of a patent article. A denial lets in another instrument made at the same time, in reality forming a part of the agreement set forth in the complaint, whereby the amount of the royalties were materially reduced.)

³ *Biederman vs. O'Conner*, 117 *Ill.*, 493; s. c., 7 *North East. Rep.*, 463.

But not that it was deposited in escrow, and wrongfully delivered before condition performed, for this would operate to surprise. *Smallwood vs. Clark*, 1 *Tayl. (N. C.)*, 281.

§ 814. — *statute of frauds*.—Plaintiff cannot, against objection, prove a contract not valid under the statute of frauds, if the answer is only a general denial or denial of the contract alleged.¹

But he may prove an oral contract with facts bringing it within an exception in the statute.²

¹ *May vs. Sloan*, 101 *U. S.*, 231; *Dunphy vs. Ryan*, 116 *id.*, 491; *Allen vs. Richard*, 83 *Mo.*, 55; *Springer vs. Kleinsorge*, 83 *id.*, 153. [*Contra*, *Gordon vs. Madden*, 82 *id.*, 193.]

Reynolds vs. Dunkirk & State Line R. R. Co., 17 *Barb.*

(*N. Y.*), 613. [*Compare Marie vs. Garrison*, 13 *Abb. N. C.* (*N. Y.*), 210, 278, 306 (Prof. DWIGHT, referee.)]
Morrison vs. Baker, 81 *N. C.*, 76.

But if the evidence is competent for another purpose it should be received, and its effect limited by instructions.
Ruggles vs. Gatton, 50 *Ill.*, 412.

* *Brock vs. Knower*, 37 *Hun* (*N. Y.*), 609; s. c., 22 *Weekly Dig.*, 510. (Delivery of another part of the lot of goods.)

§ 815. — — *admission of contract*.—If defendant's answer admits the alleged contract, the protection of the statute is waived; unless the admission is coupled with an express reference to the statute being as relied on by defendant.¹ Coupling the admission with an objection that the contract is void in law, is not enough.²

Under the New Procedure, it is the better opinion that if the complaint shows that the contract was not valid under the statute it is insufficient,³ and the statute therefore avails at the trial; and that if the complaint does not show the invalidity, an answer stating the facts which show that the contract was not valid under the statute is sufficient without express reference to the statute.

¹ *Connor vs. Hingtgen*, 19 *Nebr.*, 472; s. c., 27 *N. West. Rep.*, 443.

Duffy vs. O'Donovan, 46 *N. Y.*, 223.

Porter vs. Wormser, 94 *N. Y.*, 431.

Ashmore vs. Evans, 11 *N. J. Eq.* (3 *Stock.*), 151; *Wakeman vs. Dodd*, 27 *N. J. Eq.*, 564. (So holding even where the contract was alleged as an oral contract.)

Notwithstanding the admission, the statute avails at the trial if so referred to. (*Burt vs. Wilson*, 28 *Cal.*, 632.)

* *Vaupell vs. Woodward*, 2 *Sandf. Ch.* (*N. Y.*), 143.

Battel vs. Matot (*Vt.*, 1886), 5 *Atl. Rep.*, 479. (So held of an allegation that the contract "was never reduced to writing in any form.")

s. p., *Marston vs. Swett*, 66 *N. Y.*, 206; rev'g 4 *Hun*, 153. (Holding that an answer not denying either the making of the alleged contract nor that it was in writing, etc., is not sufficient to let in the statute of frauds as a defence, even though it aver that the contract was made on express condition that plaintiff should execute and

deliver an instrument in writing embodying a part of its terms, and had refused to do so.)

³ See § 166, DEMURRER.

⁴ *Haight vs. Child*, 34 *Barb.* (N. Y.), 186.

§ 816. *Plaintiff's breach of condition precedent as a bar.*

—It seems the better opinion that where, by reason of the condition being negative, the rule that the burden of proof is on him who has the affirmative dispenses with proof from plaintiff in the first instance,—as in the case of the forfeiture clauses in insurance policies¹ and carriers' contracts,²—breach of condition must be specially alleged by defendant in order to let in evidence of it.

In other cases, as plaintiff must allege and prove performance, a general denial lets in evidence of breach,³ except where the statute giving a short form of alleging due performance prescribes a different rule.⁴

¹ *Smith vs. Home Ins. Co.*, 47 *Hun* (N. Y.), 30; s. c., 14 *N. Y. State Rep.*, 106.

s. p., *Bennett vs. Maryland Fire Ins. Co.*, (U. S. C. Ct.) 17 *Alb. L. J.*, 363. (Following State court practice in U. S. court.)

Pettinger vs. Providence Washington Ins. Co. (Colo.), 13 *Wash. L. Rep.*, 574.

Pierce vs. Cohasset M. F. Ins. Co., 123 *Mass.*, 572.

² *Jennings vs. Grand Trunk Ry. Co.*, 52 *Hun*, 227, 232; s. c., 23 *State Rep.*, 15; 5 *N. Y. Supp.*, 140. (Allegation "that the notices required by said agreements were never given as thereby required" deemed insufficient to enable defendant to show that the notice was too late.)

³ *Chatfield vs. Simonson*, 92 *N. Y.*, 209, 215. (General denial, in action for value of services, lets in breach of duty on the employment.)

Weinberg vs. Blum, 13 *Daly* (N. Y.), 399.

Child vs. Detroit Mfg. Co., 72 *Mich.*, 623.

s. p., *Moritz vs. Larsen*, 70 *Wisc.*, 569; s. c., 36 *North West. Rep.*, 331.

s. p., at common law, *Scott vs. Kittatiny Coal Co.*, 89 *Pa. St.*, 231 (inferior quality to that contracted for); *Keen vs. Rauck*, 8 *W. N. C.*, 96 (misconduct in employment).

Gaverly vs. McOwen, 123 *Mass.*, 574. (Holding that letting

in the evidence under a defective allegation of breach was an immaterial error, because there was also a general denial.)

- * *Halferty vs. Wilmering*, 112 *U. S.*, 713; s. c., 28 *Law. ed.*, 858. (Here the complaint contained the statutory short allegation that plaintiff had duly performed all the conditions on his part. *Held*, reluctantly, that under the Code of Iowa a general denial by a defendant of each and every allegation of a petition which alleges the performance of a contract does not controvert the performance of a condition, unless the facts relied on are specifically stated.)

[See § 183, etc., DEMURRER.]

§ 817. *Denial; with specifications of breach.*—If, with a denial of plaintiff's allegation of performance of conditions on his part, the answer couples allegations of particular breaches as a part of the same statement, they may be deemed to qualify the denial; and evidence of other breaches than those specified is not admissible.¹

Otherwise where, besides allegations of specific breaches, there is a separate and sufficient general allegation of non-performance as a distinct ground of defence.²

¹ *Reed vs. Hayt*, 51 *N. Y. Super. Ct. (J. & S.)*, 121, *aff'd* in 17 *State Rep.*, 137.

² *Trimble vs. Stilwell*, 4 *E. D. Smith (N. Y.)*, 512.

§ 818. — *want of consideration.*—Original want of consideration (as distinguished from fraud in inducing a contract for a pretended consideration, and as distinguished from failure of consideration) may be shown under a general denial, provided the complaint properly contains a formal allegation of consideration.¹

If the contract is so pleaded as to show that it imports a consideration,—as in the case of negotiable paper,² or a sealed instrument,³—a general denial does not let in evidence of want of consideration.

If it is not so pleaded, and the complaint fails to

supply the necessary allegation of consideration, the complaint is insufficient.⁴

A specific denial that there was any consideration lets in evidence that there was none, whether consideration was alleged by the adverse party or not.⁵

¹ This I understand to be the common practice, and the result of the cases under the New Procedure.

Butler vs. Edgerton, 15 *Ind.*, 15; *Nixon vs. Beard*, 111 *id.*, 137; *Wheeler vs. Billings*, 38 *N. Y.*, 263. (Evidence that the money was not agreed to be paid on the conditions alleged, but after performance of additional conditions as a consideration; and that plaintiff has not performed them.) *S. P.*, *Hunting vs. Downer*, 151 *Mass.* 275. (Implied; the ruling being that defendant could not go further and show fraud.)

² *Carnwright vs. Gray*, below cited.

Patterson vs. Gile, 1 *Colo.*, 200.

According to *Nelson vs. White*, 61 *Ind.*, 139; *Beeson vs. Howard*, 44 *id.*, 413; *Bingham vs. Kimball*, 17 *id.*, 396; and *Carnwright vs. Gray*, 57 *Hun (N. Y.)*, 518, this rule applies to written promises to pay money, whether negotiable or not.

³ *Livingston vs. Tremper*, 4 *Johns. (N. Y.)*, 416.

Evans vs. Williams, 60 *Barb. (N. Y.)*, 348.

⁴ *Richardson vs. Carpenter*, 2 *Sweeny*, 360; rev'd on another ground in 46 *N. Y.*, 660.

Whether, if objection to the pleading be not taken, evidence of want of consideration can be proved under a general denial is perhaps not settled. According to the general principle that a general denial lets in anything that controverts what plaintiff must prove, it does.

Demands not alleged in a complaint may be proved, for the purpose of showing the extinguishment of other demands proved by defendant, to countervail the alleged consideration of the note sued on. *Peck vs. Winne*, 51 *N. Y.*, 641. (No opinion reported.)

⁵ *Fisher vs. Fisher*, 113 *Ind.*, 474; *s. c.*, 15 *North East. Rep.*, 832; 13 *West. Rep.*, 295. (On demurrer.)

[If consideration was alleged, the denial raises the issue. If it was not alleged, plaintiff by going to trial on the specific denial treats it as sufficient. See AIDER.)

§ 819. — *recoupment*.—It is the better opinion that a

general denial does not let in evidence in recoupment of general damages.¹ But if the facts relied on for recoupment are specially pleaded, the evidence is admissible for the purpose of establishing total want of consideration as a bar, and equally for that of recouping damages so as to reduce the recovery; and this, irrespective of whether or not the answer states for what purpose the facts are pleaded.²

- ¹ *Bolt vs. Friederick*, 56 *Mich.*, 20. (Wages.)
Wentworth vs. Dows, 117 *Mass.*, 14. (Sale). *Lamson, etc., Co. vs. Russell*, 112 *id.*, 387. (Assignment of patent.)
Krom vs. Levy, 1 *Hun* (N. Y.), 171; s. c., 3 *Supm. Ct. (T. & C.)*, 704.
 [*Contra*, perhaps, *Scott vs. Kittatiny Coal Co.*, 89 *Pa. St.* . 231. (Sale.)

- ² *Springer vs. Dwyer*, 50 *N. Y.*, 19, rev'g 58 *Barb.*, 189;
Chatfield vs. Simonson, 92 *N. Y.*, 209, 217.

Recoupment is mere matter of defence, and is not admitted by non-reply. *Foutty vs. Poar* (*W. Va.*, 1891), 12 *South East. Rep.*, 1096.

§ 820. *Failure of consideration Fraud: Abandonment.*—A general denial does not let in evidence of failure of consideration,¹ nor of fraud in inducing execution,² nor of abandonment of a contract once entered into.³

- ¹ *Swope vs. Fair*, 18 *Ind.*, 300. (Holding that the particulars of failure must be alleged.)

To same effect, *Gruninger vs. Philpot*, 5 *Biss.*, 82.

Dubois vs. Hermance, 56 *N. Y.*, 673. (Holding also that an allegation of fraud in inducing the contract does not suffice to give notice of intent to rely on failure of consideration.)

Clough vs. Murray, 19 *Abb. Pr. (N. Y.)*, 97. (Answer setting up a failure of consideration, but not stating whether partial or total, struck out.)

- ² *Hunting vs. Downer*, 151 *Mass.*, 275. (Not even fraudulent misrepresentation as to original consideration.)

McCabe vs. Caner, 68 *Mich.*, 182 (Notes); *Champlain vs. Detroit Stamping Co.*, 68 *id.*, 238. (Employment.)

[Compare § 868, DOCUMENTS.]

Laraway vs. Perkins, 10 *N. Y.*, 371.

Compare Railroad Co. vs. Trimble, 10 *Wall. (U. S.)*, 367, 383.

§ 821. *Concurrent admissions of defect in writing.*—If both parties allege that important provisions of the contract were omitted from the written instrument, it is competent for either to establish the omitted provision by oral evidence.

Doty vs. Thomson, 116 *N. Y.*, 515; s. c., 22 *North East. Rep.*, 1089, rev'g 39 *Hun (N. Y.)*, 243.

§ 822. *Defendant's breach; Excuse.*—A denial of breach or general denial does not let in evidence of excuse for non-performance.

Eiseman vs. Hawkeye Ins. Co., 74 *Iowa*, 11; s. c., 17 *Ins. L. J.*, 843.

Safety Fund Nat. Bk. vs. Westlake, 21 *Mo. App.*, 565; s. c., 4 *West. Rep.*, 881. (Cases of waiver. s. p., § 812.)

New Haven & Northampton Co. vs. Quintard, 6 *Abb. Pr. (N. S.)*, 128; s. c., less fully, 37 *How. Pr. (N. Y.)*, 29. (Act of God.)

Simmons vs. Green, 35 *Ohio St.*, 104.

Wilt vs. Ogden, 13 *Johns. (N. Y.)*, 56. (Otherwise at Common Law, where a general denial lets in any evidence which shows that plaintiff never had a cause of action.)

CORPORATIONS. [See also AGENCY and AUTHORITY.]

§ 823. *Act implies capacity.*—An unqualified admission of the making of the contract by a corporation is also an admission of its power and capacity to make the contract.

Monson vs. St. Paul. M. & M. Ry. Co., 34 *Minn.*, 269; s. c., 25 *North West. Rep.*, 595. Citing *La Grange Mill Co. vs. Bennewitz*, 28 *Minn.*, 62; s. c., 9 *North West. Rep.*, 80. s. p., *Commercial Bank vs. Pfeiffer*, 108 *N. Y.*, 242, 252; s. c., 13 *N. Y. State Rep.*, 506.

COSTS.

§ 824. Allegation of ground for costs ; § 825. — in actions of a legal nature and right to prove—in equity.

§ 824. *Allegation of ground for costs ; right to prove—in equity.*—In Equity, and in actions of an Equitable nature, since costs are in the discretion of the Court, facts relevant to the proper determination of that question may be pleaded,¹ and cannot be proved (solely for that purpose) unless pleaded.²

Failure to establish the cause of action or defence, does not necessarily deprive the party of the right to give evidence merely for the purpose of determining the question of costs.³

¹ *Hawley vs. Wolverton*, 5 *Paige* (N. Y.), 522 ; *Desplaces vs. Goris*, 1 *Edw.* (N. Y.), 350 ; *Casey vs. Casey*, 2 *Barb.* (N. Y.), 59 ; *Van Rensselaer vs. Brice*, 4 *Paige* (N. Y.), 174. (In chancery.)

Colton vs. Vanderbilt, 3 *N. Y. Monthly L. Bul.*, 36. (Under Code : offer of judgment before answer may be pleaded.)

² *Howard vs. Tiffany* 3 *Sandf.* (N. Y.), 695. (Under Code, and holding therefore that such allegations could not be struck out.)

s. p., *Evans vs. Burton*, 5 *N. Y., State Rep.*, 216 ; s. c., 25 *Weekly Dig.*, 227.

³ *Kelley vs. McMahon*, 37 *Hun*, 212 ; s. c., 22 *N. Y. Weekly Dig.*, 87.

§ 825. — *in actions of a legal nature.*—In an action of a legal nature, where the right to costs is statutory, evidence relevant to the question which party is entitled to them, is not admissible solely for that purpose (unless the statute so indicates), even though the facts be in issue.

Burrows vs. Butler, 38 *Hun* (N. Y.), 157, 160. (Holding that in an action of a common-law nature against an executor or administrator, where the right to costs depends under the statute on the question whether plaintiff

offered to refer before suing, that question forms no part of the issue to be tried by the jury, although raised by the pleadings on both sides ; but must be determined by the Court on motion on affidavits after verdict for plaintiff.)

[*Compare Hone vs. De Peyster*, 106 *N. Y.*, 645, rev'g 44 *Hun*, 487.]

s. p., *Clyde & Rose Plank Road Co. vs. Parker*, 22 *Barb. (N. Y.)*, 323, aff'g *The same vs. Baker*, 12 *How. Pr. (N. Y.)*, 371.

DAMAGES. [See also **AMOUNT ; CONTRACTS ; FACTS OCCURRING PENDING SUIT ; INDEBTEDNESS ; INTEREST ; PAYMENT.**]

§ 826. General allegation.

827. Diminution of rental value.

828. Loss of rent.

829. General allegation of damage from personal injury.

830. — Vocation and ordinary earnings.

831. Medical expenses.

832. Dependent family ; embarrassment.

§ 833. Damages pending suit: Legal actions.

834. — Equitable actions.

835. Rule as to action by married woman.

836. Plaintiff's prevention of defence.

837. Evidence appropriate to different theories.

838. Aggravation of damages.

839. Mitigation.

§ 826. *General allegation.*—The usual general allegation of damage to the plaintiff in a specified sum, lets in evidence of such damages as were the natural and legally presumable consequences of the injury.¹

Damages which are not the usual or legally presumable consequence cannot be proved under a general allegation,² but must be alleged sufficiently to give defendant notice that recovery therefor would be claimed.³

[Many authorities say “natural and necessary,” but “necessary” here does not mean “inevitable,” but only legally presumable.]

¹ *Burrell vs. N. Y. & Saginaw Solar Salt Co.*, 14 *Mich.*, 34. (In action for refusal to permit plaintiff to perform his contract with defendant, loss of profits which would have been the direct result of fulfilling the contract provable.) Followed by *Sedgw. on D.*
² *s. p.*, *Taylor vs. Bradley*, 4 *Abb. Ct. App. Dec. (N. Y.)*, 363.

Laraway vs. Perkins, 10 *N. Y.*, 371. (Breach of agreement to build house and take a house and lot in payment: difference in value provable.)

Driggs vs. Dwight, 17 *Wend. (N. Y.)*, 71. (Allegation of refusal to give possession: expenses of removal to other premises recoverable.)

[*Compare Taylor vs. Bradley*, 4 *Abb. Ct. App. Dec. (N. Y.)*, 363, 381.]

Compare O'Connor vs. Nat. Ice Co., 56 *N. Y. Super. Ct.*, 410; s. c., 21 *State Rep.*, 907; 4 *N. Y. Supp.*, 537. [Allowing loss of customers and consequent profits of milk route to be recovered as general damages for injuries to plaintiff's person and team.)

^a *Cole vs. Swanston*, 1 *Cal.*, 51. (Executory sale: inability of plaintiff to fulfil bargain with third person not provable.)

Nunan vs. City and County of San Francisco, 38 *Cal.*, 689. (Subscription-list book: value recoverable, but evidence that it cost \$2 per name not admissible.)

Olmstead vs. Burke, 25 *Ill.*, 86. (Wrongful eviction by landlord: probable value of crop not provable.)

s. p., *Lindley vs. Dempsey*, 45 *Ind.*, 246. (But value of labor in planting is provable.)

Johnson vs. Mathews, 5 *Kans.*, 118. (Contract to transport machine: consequent idleness of plaintiff's hands awaiting its arrival, not provable.)

Roberts vs. Hyde, 15 *La. An.*, 51. (Contract for delivery of timber: hindrance of business by consequent delay in finishing structure not provable.)

Shaw vs. Hoffman, 21 *Mich.*, 151. (Ejection from stable: cost of stabling elsewhere not provable.)

Gray vs. Bullard, 22 *Minn.*, 278. (Carrying away personal property: expense of recovering not provable.)

Stevens vs. Sonto (N. Y. City Ct.), 2 *N. Y. Supp.*, 484; s. c., 18 *State Rep.*, 929. (Sale, and defect in quality: loss of profits not provable.) s. p., *Wilson vs. Dubois*, 35 *Minn.*, 471; s. c., 29 *North West. Rep.*, 68. (Holding also that it is indispensable to state name of intending purchaser.)

Agnew vs. Johnson, 22 *Pa. St.*, 471. (Stereotype plates.) s. p., *Buffalo Barb Wire Co. vs. Phillips*, 67 *Wisc.*, 129; s. c., 25 *North West. Rep.*, 268.

^a *The Director*, 26 *Fed. Rep.*, 708, 713. (Shipper against owner, for false representation as to seaworthiness resulting in loss of cargo; allegation that "the libellants have lost a sale of the aforesaid cargo, negotiated and contracted [in a place and at a time named], to their

- damage \$4,000," insufficient; because facts as to how injured, and amount of damage, were not stated.)
- Taylor Mfg. Co. *vs.* Hatcher Mfg. Co. (*C. Ct. S. D. Ga.*), 39 *Fed. Rep.*, 440; s. c., 3 *Law. R. Ann.*, 587. (Damages "for the destruction of its business," too indefinite.)
- Taylor *vs.* Keeler, 50 *Conn.*, 346. (Allegation of obstruction of mill by flowing land; injury to the land not provable.)
- McTavish *vs.* Carroll, 13 *Md.*, 429. (Obstruction of mill-race: allegation of loss of profit, etc., from its working, does not let in evidence that plaintiff, who raised grain, had to carry it to a distant mill.)
- Prentiss *vs.* Barnes, 6 *Allen (Mass.)*, 410. (Breach of bond to remove barn: allegation of a great nuisance to plaintiff, by reason of the offensive smells and other annoyances arising from the defendant's use and occupation of said barn, sufficient; and not special damages.)
- Maltby *vs.* Plummer, 71 *Mich.*, 578; s. c., 40 *North West. Rep.*, 3. (Failure to supply logs as agreed: allegation that orders for timber "may have been lost" not sufficient.)
- Taylor *vs.* Dustin, 43 *N. H.*, 493. (Obstruction of mill-stream: allegation that plaintiff "was during all that time deprived of the use of his said mill and works, and of all the benefits, profits, gains, and advantages which he would otherwise have made,"—*held*, sufficient to admit evidence to show the price paid for wool, the cost of its manufacture, the number of yards manufactured per day, the price per yard for which it was sold, and the length of time the mill was obliged to lie still.)

§ 827. *Diminution of rental value.*—General damages for injury to improved real property include diminution of rental value,¹ even though there be no allegation of intention to rent;² but not actual loss of rent, for this is special damages.³

¹ Colrich *vs.* Swinburne, 105 *N. Y.*, 503.

² Michel *vs.* Supervisors of Monroe, 39 *Hun (N. Y.)*, 47.

³ Parker *vs.* City of Lowell, 11 *Gray (77 Mass.)*, 353.

Adams *vs.* Barry, 10 *Gray (76 Mass.)*, 361.

[*Contra, dictum* in Jutte *vs.* Hughes, 67 *N. Y.*, 267.]

Plimpton *vs.* Gardiner, 64 *Me.*, 360.

Potter *vs.* Froment, 47 *Cal.*, 165.

§ 828. — *Loss of rent.*—An allegation that the acts complained of interfered with, or hindered, the letting of the premises, is a sufficient allegation of loss of tenants and rents, to let in evidence of the actual loss.¹

But an allegation of injury to plaintiff and his goods does not let in evidence of injury to a tenant's business, and his consequent loss of custom and abandonment of premises.²

¹ *Jutte vs. Hughes*, 67 *N. Y.*, 267.

² *Squier vs. Gould*, 14 *Wend.* (*N. Y.*), 159.

§ 829. *General allegation of damage from personal injury.*—A general allegation of damages from bodily injuries admits evidence of—

- (1) the details of those injuries;¹
- (2) the bodily pain and suffering;²
- (3) the mental suffering and anxiety;³
- (4) the impairment of health and physical condition,⁴ even since the commencement of the action.⁵
- (5) and of reasonably certain future continuance, increase, or recurrence of like consequences.⁶

¹ *Ehrgott vs. Mayor, etc.*, of *N. Y.*, 96 *N. Y.*, 264; s. c., 19 *Weekly Dig.*, 319; rev'g 66 *How. Pr.*, 161.

Babcock vs. St. Paul, M. & M. R. Co., 36 *Minn.*, 147; s. c., 30 *North West. Rep.*, 449.

s. p., *Delie vs. Chicago & N. W. Ry. Co.*, 51 *Wisc.*, 400.

² *Curtiss vs. Rochester & Syracuse R. R. Co.*, 20 *Barb.*, 282, aff'd in 18 *N. Y.*, 534, without referring to the question of pleading.

Roberts vs. Graham, 6 *Wall. (U. S.)*, 578. ("Great inconvenience and injury" lets in evidence of resulting illness, for this is not special damages.)

³ *Wright vs. Compton*, 53 *Ind.*, 337.

Gulf, etc., R. Co. vs. Hurley, 24 *Tex.*, 593; s. c., 12 *South West. Rep.*, 226.

⁴ *Chicago, B. & Q. R. Co. vs. Sullivan* (*Ill.*, 1888), 15 *West. Rep.*, 45; s. c., 17 *North East. Rep.*, 460.

Ohio & M. R. Co. vs. Hecht, 115 *Ind.*, 443; 15 *West. Rep.*, 122; 17 *North East Rep.*, 297.

Tyson vs. Booth, 100 *Mass.*, 258.

Where the injury is to the feelings, etc., not the body, as in breach of promise, injury to health must be specially pleaded. *Bedell vs. Powell*, 13 *Barb. (N. Y.)*, 183.

^a *Hopkins vs. Atlantic & St. Lawrence R. R.*, 36 *N. H.*, 9. *Birchard vs. Booth*, 4 *Wis.*, 67.

^c *Curtis vs. The Rochester & Syracuse R. R. Co.*, 18 *N. Y.*, 534.

Meier vs. Shrunk, 79 *Iowa*, 17; s. c., 44 *North West. Rep.*, 209.

Loss of marriage prospects by an unmarried woman must be specially alleged. *Hunter vs. Stewart*, 47 *Me.*, 419.

§ 830. — *Vocation and ordinary earnings.*—To let in evidence of plaintiff's vocation and previous usual earnings, an allegation that he was prevented from attending to his ordinary business is enough,¹ and the amount of earnings need not be alleged unless his vocation is one bringing high compensation for a high degree of skill.² But a mere allegation of bodily hurt is not enough.³

It is the better opinion, however, that in an action by an employe against his employer, for an injury sustained in the course of the employment, loss of earnings or earning power may be proved without special allegation; for defendant cannot be surprised.⁴

¹ *Ehrgott vs. Mayor, etc.*, of *N. Y.*, 96 *N. Y.*, 264; s. c., 19 *Weekly Dig.*, 319, rev'g 66 *How. Pr.*, 161.

Cabot vs. McKane, 1 *N. Y. State Rep.*, 495.

Meier vs. Shrunk, 79 *Iowa*, 17; s. c., 44 *North West. Rep.*, 209.

Luck vs. City of Ripon, 52 *Wisc.*, 196; *Bierbach vs. Good-year Rubber Co.*, 54 *id.*, 208.

But not to let in evidence of amount paid a substitute.

Gumb vs. Twenty-third Street R. Co., 114 *N. Y.*, 411; s. c., 23 *State Rep.*, 748, rev'g 53 *Super. Ct. (J. & S.)*, 466.

[*Contra*, holding an allegation of being prevented from attending to ordinary business not enough. *Taylor vs. Monroe*, 43 *Conn.*, 36; *Tomlinson vs. Derby*, *id.*, 562.]

² *Parshall vs. Minneapolis & St. L. R. Co.*, (*C. C. D. Minn.*), 35 *Fed. Rep.*, 649; *Collins vs. Dodge*, 37 *Minn.*, 503; s. c., 35 *North West. Rep.*, 368.

³ *Baldwin vs. Western R. R. Corporation*, 4 *Gray (Mass.)*, 333. ("To her great hurt and damage," not enough.)

Saffer vs. Dry Dock, etc., R. R. Co., 5 N. Y. Supp., 700 ; s. c., 24 State Rep., 210.

* *Conner vs. Pioneer Fire Proof Constr. Co., 29 Fed. Rep., 629.* With *dictum* that when the vocation is one requiring high skill, and receiving high compensation, a special allegation is necessary.)

§ 831. *Medical expenses.*—Medical expenses are not recoverable without a special allegation.

O'Leary vs. Rowan, 31 Mo., 117.

[*Compare Hawes vs. O'Reilly, 126 Pa. St., 440 ; s. c., 17 Atl. Rep., 642.* (Refusing to set aside verdict.)]

Knapp vs. Sioux City & P. R. Co., 71 Iowa, 41 ; s. c., 32 North West. Rep., 18. (Allegation of expenses for medical attendance lets in evidence of expenses for the medicines the physician used.)

§ 832. — *Dependent family ; embarrassment.*—An allegation of lost time and of expenses does not let in evidence as to plaintiff's dependent family, nor that he became embarrassed in consequence of the injury.

Laing vs. Colder, 8 Barr (Pa. St.), 479.

§ 833. *Damages pending suit:—legal actions.*—In actions of a legal nature, whether on contract¹ or for tort,² evidence of additional damages is not to be excluded merely because they were incurred after commencement of the action, ³ unless they are such as would sustain a second action after recovery of all damages up to the commencement of the present action ;—as in case of the continuance of a nuisance.

¹ *Behrman vs. Linde, 23 N. Y. State Rep., 490 ; 5 N. Y. Supp., 898.* (Breach of contract to furnish cold storage.)

Cummings vs. Hausen, 63 How. Pr. (N. Y.), 351. (Contract for rent with board.)

McAndrews vs. Tippet, 39 N. J. Law, 105. (Defendant prevented plaintiff from performing.)

² *Curtis vs. Rochester & Syracuse R. R. Co., 18 N. Y., 534.* (Action for personal injuries.)

Hopkins vs. Atlantic & St. Lawrence R. R. Co., 36 N. H., 9. (Husband's expenses for wife's cure.)

Birchard vs. Booth, 4 *Wis.*, 67. (Assault and battery.)

* If they are special damages, the pleading must, of course, indicate that such special damages were claimed.

⁴ *Uline vs. N. Y. Cent. R. R. Co.*, 101 *N. Y.*, 98. (Where a railroad is constructed in a street, in an action by an adjacent owner to recover damages, he is entitled to recover simply damages sustained up to the commencement of the action; and it seems that for any damage thereafter sustained, other actions may be brought successively until the nuisance shall be abated.)

s. p., *Mahon vs. N. Y. Central R. R. Co.*, 24 *N. Y.*, 658.

§ 834.—*Equitable actions*.—In actions for equitable relief with incidental damages, or for both legal and equitable relief, evidence is admissible of damages subsequent to the commencement of the action, and of prospective damages, notwithstanding they would sustain a separate action.

¹ *Henderson vs. N. Y. Central R. R. Co.*, 78 *N. Y.*, 423, 434.

(Where a railroad is unlawfully constructed in a street, adjacent property-owner suing for an injunction and damages is entitled to recover damages for permanent depreciation.)

² *Barrick vs. Schifferdecker*, 48 *Hun (N. Y.)*, 355. (Action for an injunction against the continuation of a nuisance and for damages for its maintenance. *Held*, that as the action was for relief both at law and in equity, it was proper for the Court to allow a recovery for damages down to the day of trial, because when a court of equity once has jurisdiction of a case it awards all the relief the nature of the case demands. *So held*, notwithstanding the amount of damages occasioned by a nuisance is triable by jury as a matter of right, although equitable relief is asked.)

s. p., *Davis vs. Lambertson*, 56 *Barb. (N. Y.)*, 480. (Facts after suit.)

[At law, the recovery of prospective damage, or damage accruing after the action is brought, is a question of the entirety of the cause of action; whereas in equity the recovery of such damages is permissible in order to afford a complete remedy, and to avoid the multiplicity of actions.]

§ 835. *Rule as to action by married woman*.—Presumptively, damages for diminishing the earning capacity

of a married woman belong to her husband ; and, when she seeks to recover such damages, the complaint must show that she is entitled to the fruits of her own labor ; or, if she seeks damages for an injury to her business, that she was engaged in business on her own account, and incurred specific damages therein.

Uransky vs. Dry Dock, East Broadway, etc., R. R. Co.,
118 *N. Y.*, 304.

§ 836. *Plaintiff's prevention of defence.*—A general denial does not let in evidence that plaintiff prevented acts of defendant which would have constituted a defence or mitigated the damages.

Richtmeyer vs. Remsen, 38 *N. Y.*, 206. (Escape).

§ 837. *Evidence appropriate to different theories.*—Where the true rule of damages is an open question of law, it is not error to allow the party to give evidence appropriate to each rule, the Court instructing the jury properly.

Cook vs. Soule, 45 *How. Pr. (N. Y.)*, 340 ; s. c., less fully,
1 *Supm. Ct. (T. & C.)*, 116 ; aff'd, on other grounds, in
56 *N. Y.*, 420.

§ 838. *Aggravation of damages.*—At common law, circumstances of aggravation,—such for instance as outrage and oppression,—which are part of the wrongful act complained of, and constitute the manner of doing it, may be proved though not alleged ;¹ and when alleged they are not alone traversable.²

Under the New Procedure, the better opinion is that while the manner of doing an act so far as fairly descriptive of the act constituting the cause of action may be proved, circumstances separable from the manner of doing cannot be proved for the purpose of enhancing the damages, unless alleged ;³ and that if alleged they are admitted if neither the act nor the circumstances are denied.⁴

¹ *Burrage vs. Melson*, 48 *Miss.*, 237; *Schofield vs. Ferrers*, 46 *Pa. St.*, 438.

² Such for instance as seduction, in breach of promise. *Cates vs. McKinney*, 48 *Ind.*, 562; *Leavitt vs. Cutler*, 37 *Wisc.*, 46.

⁴ *Manners vs. Haverhill*, 135 *Mass.*, 165.

§ 839. *Mitigation*.—Whether matter in mitigation of damages can be proved if not pleaded, compare § 633, n. 5.

Mayo vs. City of Springfield, 138 *Mass.*, 70.

Slocum vs. Riley, 145 *Mass.*, 370.

Bonino vs. Caledonia (Mass.), 11 *North East. Rep.*, 98.

Muser vs. Lewis, 50 *N. Y. Super. Ct. (J. & S.)*, 431, 440; s. c., 14 *Abb. N. C.*, 333; *Wandell vs. Edwards*, 25 *Hun (N. Y.)*, 498; *Bradner vs. Faulkner*, 93 *N. Y.*, 515, rev'g 16 *Weekly Dig.*, 240; *Catlin vs. Adirondack Co.*, 12 *N. Y. Weekly Dig.*, 4; *Willis vs. Taggard*, 6 *How. Pr. (N. Y.)*, 433; *Thompson vs. Halbert*, 109 *N. Y.*, 329; s. c., 21 *Abb. N. C. (N. Y.)*, 266, rev'g 40 *Hun*, 536; *N. Y. Code Civ. Pro.*, § 536.

United States vs. Ordway, 30 *Fed. Rep.*, 30; *Burdell vs. Denig*, 92 *U. S.*, 716.

DATE. [See also ACTION PREMATURE; DOCUMENTS; FACTS OCCURRING PENDING SUIT; TIME.]

§ 840. Variance in dates.

§ 841. Amending date.

§ 840. *Variance in dates*.—The technical rules of the Common Law as to variance in dates,¹ are discarded by the New Procedure; and (except so far as the sufficiency of the cause of action or defence depends on a specific date), the question now is simply whether the adverse party has been misled.²

¹ *United States vs. Le Baron*, 4 *Wall*, 642; *Eastman vs. Bodfish*, 1 *Story*, 528; 1 *Chitt. Pl.*, 16 *Am. ed.*, 240*, 274*, 318*. (Strict rules.)

Lyon vs. Clark, 8 *N. Y.*, 148. (Lax rule as to immaterial dates.)

² *Dubois vs. Beaver*, 25 *N. Y.*, 123, aff'g 34 *Barb.*, 547. (Trespass: an act anterior to the day stated in the com-

plaint may be proved if it does not appear that defendant is misled.)

Fowler vs. Martin, 1 *N. Y. Supm. Ct. (T. & C.)*, 377; aff'd, it seems, in 56 *N. Y.*, 676, but no opinion. (Date of marriage promise: two years' variance disregarded.)

Babbett vs. Young, 51 *Barb.*, 466, aff'd in 51 *N. Y.*, 238. (Delivery and acceptance of property.)

Beach vs. Tooker, 10 *How. Pr. (N. Y.)*, 297. (New promise: three years' variance disregarded.)

[As to form of allegation, see *DEMURRER*, § 214.]

§ 841. *Amending date*.—Where by mistake a wrong date is alleged, even though it is such a date as is fatal to the action, the Court have power to allow amendment at the trial by substituting the true date, if that be one which will sustain the action.

Kansas, etc., R. R. Co. vs. Kunkel, 17 *Kans.*, 145. (The date stated showed the cause of action to be barred by statute; motion to amend when the case was called for trial, granted. Otherwise, if it appeared that, under any pretence of amendment, a cause of action not barred was substituted for one barred; and the Court may look at the whole record to determine that question.)

Tuttle vs. Jackson, 6 *Wend. (N. Y.)*, 213; s. c., 21 *Am. Dec.*, 306. (Ejectment: demise laid before the lessor's title accrued will be fatal to the declaration; but where the action was commenced long after the title accrued, the declaration may be amended, as the error is one of form only.)

[For other cases, see *Cooper vs. McKeen*, 11 *Colo.*, 41; s. c., 17 *Pacif. Rep.*, 97; *Poillon vs. Volkenning*, 11 *Hun (N. Y.)*, 385.]

In *Boston Nat. Bank vs. Armour*, 50 *Hun*, 176; s. c., 16 *N. Y. Civ. Pro.*, 147; 20 *N. Y. St. Rep'r*, 29; 3 *N. Y. Supp.*, 22, it was held, rather strangely, that where the copy of a complaint served upon defendant correctly states a date incorrectly stated in the original complaint, the Court has no power to change the date; the remedy of defendant is either to strike from the record the original complaint upon the ground that no copy thereof was served, or to set aside the service upon the ground that no copy of the original complaint had been served.

DEMAND. [See also NOTICE.]

§ 842. *Necessity of alleging*.—Whether demand can be proved if not alleged, see

Hall *vs.* Farmers' & Cit. Sav. Bk., 55 *Iowa*, 612; *Marrion-neaux vs. Downs*, 19 *La. Ann.*, 208; *Blackstone Nat'l Bk. vs. Lane*, 80 *Me.*, 165; s. c., 6 *New Engl. Rep.*, 148; *State vs. Grupe*, 36 *Mo.*, 365; *Battel vs. Crawford*, 59 *Mo.*, 215; *Simser vs. Cowan*, 56 *Barb. (N. Y.)*, 395; *Fullerton vs. Dalton*, 58 *id.*, 236; *Blakey vs. Douglass*, 1 *Pa. S. C. Dig.*, 234.

DETENTION. [See also OWNERSHIP.]

§ 843. Evidence of conversion.

§ 844. Title in a stranger admissible under a general denial.

§ 843. *Evidence of conversion*.—An allegation of wrongful detention lets in evidence, and is sustained by proof, of a conversion.

Rawley vs. Brown, 11 *N. Y. Weekly Dig.*, 454.

§ 844. *Title in a stranger admissible under a general denial*.—If the complaint merely alleges wrongful detention of plaintiff's property, whether the action be ejectment, replevin, or conversion, a general denial lets in evidence of title in a stranger, though defendant do not connect himself therewith.

[Citing *Caldwell vs. Bruggerman*, 4 *Minn.*, 270; *Jones vs. Rahilly*, 16 *id.*, 320; *Kennedy vs. Shaw*, 38 *Ind.*, 474; *Sparks vs. Heritage*, 45 *id.*, 66, and distinguishing *Stowell vs. Otis*, 71 *N. Y.*, 36.] *Griffin vs. Long Island R. R. Co.*, 101 *N. Y.*, 348.

Siedenbach vs. Reiley, 111 *N. Y.*, 560, 566. (Replevin, holding that wrongful taking not being alleged, but only wrongful detention, general denial let in evidence entitling a stranger not connected with defendant.)

[As to allegation of wrongful detention, see DEMURRER, § 225.]

DEFECT OF PARTIES. [See also CAPACITY.]

[Defect of parties as a ground of demurrer, see DEMURRER, §§ 442, etc.]

§ 845. Must be specially pleaded.

§ 847. Ignorance as an excuse.

846. Evidence of defect.

848. Facts in avoidance occurring after commencement of action.

§ 845. *Must be specially pleaded.*—Under the New Procedure, evidence of a defect of parties plaintiff,¹ or defendant,² by omission to join all jointly interested, or liable, upon contract,³ or otherwise, is not available unless specially pleaded. A general denial,⁴ or a denial of the contract,⁵ is not sufficient.

Even where the objection is taken by answer, it is not available at the trial if the defect appears on the face of the complaint, and a demurrer therefore might have been sustained.⁶

These rules do not apply to the absence of an indispensable party; that is to say, one without whose presence a just determination of the controversy cannot be had by saving his rights.⁷

¹ Carr vs. Security Ins. Co., 109 *N. Y.*, 504. (Where mortgagee should have been made a party to an action upon a policy of insurance.)

Davis vs. Bechstein, 69 *N. Y.*, 440; s. c., 25 *Am. R.*, 218. (Action to set aside a bond and mortgage.)

Atkinson vs. Mott, 102 *Ind.*, 431; s. c., 3 *Western Rep.*, 307.

Pike vs. Martindale, 91 *Mo.*, 268; s. c., 6 *Western Rep.*, 839. (Action to cancel deed and for possession. *Held*, an objection that the conveyance under which plaintiff claimed, though absolute in form, was intended as security for a debt to his firm, and that his partners were not joined, could not be raised for the first time at the trial. [Citing *Rev. Stat.*, § 3519; *Kellogg vs. Malin*, 62 *Mo.*, 429; *Butler vs. Lawson*, 72 *Mo.*, 247.]

² Hosley vs. Black, 28 *N. Y.*, 438. (Action for services by a teacher against two of three school trustees.)

- Decker *vs.* Decker, 108 *N. Y.*, 128. (Creditor's action.)
- * Merritt *vs.* Walsh, 32 *N. Y.*, 685. (Non-joinder of all of the co-owners of a vessel in an action for freight.)
- Trenor *vs.* Central Pacific R. Co., 50 *Cal.*, 222. (Action by one of two partners for services rendered by the partnership.)
- McConnell *vs.* Brayner, 63 *Mo.*, 461. (Action for the price of land by one of two grantors.)
- * Warner *vs.* Ross, 9 *Abb. N. C. (N. Y.)*, 385. *So held* also under a denial of partnership: Karselsen *vs.* Sun Fire Office of London, 45 *Hun (N. Y.)*, 144. (Action by plaintiffs as partners. Denial of co-partnership.) *Compare* Nanson *vs.* Jacob, 93 *Mo.*, 331; s. c., *South. Rep.*, 246.
- * Zabriskie *vs.* Smith, 13 *N. Y.*, 322; Depuy *vs.* Strong, 4 *Abb. Pr. N. S.*, 340; less fully, 37 *N. Y.*, 372; Fourth Nat'l Bank of N. Y. *vs.* Scott, 31 *Hun (N. Y.)*, 301; Blount *vs.* Wetherell, 32 *Hun (N. Y.)*, 386; Snyder *vs.* Bliss, 19 *N. Y. Weekly Dig.*, 304; Matthews *vs.* Stietz, 5 *N. Y. Civ. Pro. R.*, 235.
- * Special provision that the omission to join one of several public officers with the others must be taken by answer. *N. Y. Code Civ. Pro.*, § 1929. It is the better opinion that this is to be construed as not hostile to the general rule, that if the defect appears on the face of the complaint it should be taken by demurrer.
- * Osterhoudt *vs.* Supervisors of Ulster, 98 *N. Y.*, 239, 243.
- Bear *vs.* American Rapid Tel. Co., 36 *Hun (N. Y.)*, 400. (Action by one of a few joint beneficiaries in a trust to enforce the joint rights of all. *Held*, it was indispensable that the other parties be brought in, and the omission to do so is ground for reversal on appeal, although the objection was not taken in pleading.)
- Wallace *vs.* Holmes, *U. S. Circ. (Conn.)*, 9 *Blatchf.*, 65; s. c., 5 *Fish. Pat. Cas.*, 37.
- Dupuy *vs.* Strong, 4 *Abb. Pr. N. S.*, 340; less fully, 37 *N. Y.*, 372.
- In some jurisdictions, answering over, after a demurrer for want of a proper party is overruled, waives the objection. *State vs. Sappington*, 68 *Mo.*, 454.

§ 846. *Evidence of defect.*—Where a defect of parties is alleged as a defence, because of the non-joinder of several persons who were parties to the joint contract sued on, evidence is inadmissible to show that even only a part of the persons named are interested.

Weigand vs. Sichel, 4 *Abb. Ct. App. Dec.* (N. Y.), 592 (opinion also in 3 *Keyes*, 120). (In an action for goods sold, an answer that A and B were partners with the defendant and should have been joined is not sufficient to admit proof that A alone was a partner.)

§ 847. *Ignorance as an excuse*.—Omission to plead defect of parties cannot be made available, without amendment of the answer, by evidence that defendant was ignorant of the facts until the trial.

Fairmount Coal & Iron Co. vs. Hasbrecht, 48 *Hun* (N. Y.), 206. (The statute makes no exception in favor of ignorance. *Dictum* that in such case it would be error to refuse the defendant to amend his answer.)

§ 848. *Facts in avoidance occurring after commencement of action*.—Even if defect of parties be specially pleaded, death before the trial may be proved to avoid the objection if the case is such that the right or liability survived to those who are joined, and them alone.

Groot vs. Agens, 107 *N. Y.*, 633.

In *Kilbourn vs. Sunderland*, 130 *U. S.*, 505; s. c., 32 *Law. ed.*, 1005, an objection for defect of parties was held sufficiently answered by showing that the absent one had before suit assigned all his interest to those who were parties, and by his voluntary appearance entered by counsel, with a disclaimer "of all right and cause of action on his part against the defendants, or any of them, on account of any of the matters set forth or involved in this cause."

s. p., Mayor, etc., of *Brunswick vs. Finney*, 54 *Ga.*, 317.

DOCUMENTS. [See also ABBREVIATIONS; ACCOUNTS; CONTRACTS; DEEDS.]

A. *In the Absence of Statute.*

§ 849. Admission of allegation of instrument dispenses with production. § 850. Lost instrument.

B. *Under Statutes or Rules of Court Annexing or Filing.*

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|--------------------------------------------------------|-----------------------------------------------------------|
| § 851. What instruments are within such a statute. | § 857. Contract not alleged to be in writing. |
| 852. Object of the statutes. | 858. Variance between original and allegation or exhibit. |
| 853. Amended pleading. | 859. Exhibit not evidence as such. |
| 854. Replication. | 860. — but admissible as evidence against the pleader. |
| 855. Language. | |
| 856. Exclusion of evidence for not furnishing exhibit. | |

C. *Effect of Statutes and Rules of Court Requiring Verified Denials of Written Instruments and Particular Facts.*

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|--------------------------------------------------------------------|---------------------------------------------------------------------|
| § 861. Sworn denial not evidence for the pleader. | § 867. — admitting validity. |
| 862. Want of consideration. | 868. — fraud inducing execution. |
| 863. Signing as agent. | 869. Statutes affecting burden of proof :—effect of unsworn denial. |
| 864. Alterations. | |
| 865. Omission as affecting the issue : dispensing with production. | 870. — effect of sworn denial. |
| 866. — allowing evidence. | 871. — preliminary proof. |

A. *In the Absence of Statute.*

§ 849. *Admission of allegation of instrument dispenses with production.*—If an instrument is fully pleaded¹ and there is no denial, it is not error to rule that the party pleading it need not put it in evidence,² nor even produce it for inspection.³

If the party who has admitted it was made, desires to use it as evidence, he must require its production on his own behalf as he would any other document; and if not produced on proper call for it, he may give secondary evidence of it.⁴

¹ In *Mansfield vs. Kerner*, 4 *Hun* (N. Y.), 133, it seems to have been held that an answer referring in general terms to a contract and specifications which neither party has set forth in pleading is not an admission of any particular document, such as to entitle plaintiff to recover without putting the document in evidence. (Mere mem. opin., not reported.)

² *Landers vs. Bolton*, 26 *Cal.*, 393, 416.

Grange Mills Co. *vs.* Western Assurance Co., 118 *Ill.*, 396; s. c., 7 *West. Rep.*, 423.

s. p., Wing *vs.* Stewart, 68 *Iowa*, 13; s. c., 25 *North W. Rep.*, 905.

Osborne *vs.* Kline, 18 *Nebr.*, 344; s. c., 25 *North W. Rep.*, 360.

Surget *vs.* Byers, *Hempst. (U. S. C. Ct.)*, 715, 718. (So holding even where the bill contained a proffer of production.)

s. p., Green *vs.* Campbell, 2 *Jones N. Car. Eq.*, 446.

Plenty *vs.* Rendle, 43 *Hun (N. Y.)*, 568. (Holding that as the issue did not require any other evidence, it was error not to allow defendant to open and close.) Spear *vs.* Hart, 3 *Robt. (N. Y.)*, 420; Roberts *vs.* Societa Anonima, 53 *N. Y. Super. Ct. (J. & S.)*, 424.

Cocks *vs.* Hart, 18 *Tex.*, 554.

s. p., Carson *vs.* Clark, 1 *Mo.*, 159.

So held of an express reference to the instrument in the answer which indirectly recognized its existence. Durant *vs.* Abendroth, 15 *N. Y. State Rep.*, 339.

The fact that it bears an alteration making it different from what is admitted does not alter the rule. King *vs.* Stewart, 68 *Iowa*, 13; s. c., 25 *North West. Rep.*, 905.

[*Contra*, Sheehy *vs.* Mandeville, 7 *Cranch (U. S.)*, 208, 217. (MARSHALL, Ch. J., says: "The practice of this country is to require that the note should be produced or its absence accounted for, and the rule is a safe one.")]

² Cocks *vs.* Hart (above cited).

⁴ Howell *vs.* Huyck, 2 *Abb. Ct. App. Dec. (N. Y.)*, 423; s. p., Bompas *vs.* Timms, 3 *Sneed (Tenn.)*, 459; Brown *vs.* Phelon, 2 *Swan (Tenn.)*, 629; Wells *vs.* Moore, 15 *Tex.*, 521.

§ 850. *Lost instrument.*—Under the New Procedure it is not necessary to allege the loss of the instrument sued on, to let in evidence of its loss and secondary evidence of its contents,¹ unless made necessary by a statute requiring a copy to be annexed or filed.²

¹ Supervisors of Livingston *vs.* White, 30 *Barb. (N. Y.)*, 72. The common-law requirement rests wholly on the necessity of stating loss if oyer is craved. *Id.*; 1 *Chitt. Pl.*, 16 *Am. ed.*, 380; Jansen *vs.* Bell, 6 *Cow. (N. Y.)*, 629. For Equity rule, see Findlay *vs.* Hinde, 1 *Pet. (U. S.)*, 241.

B. *Under statutes or rules of court requiring annexing or filing.*

[Statutes allowing a short mode of pleading instruments for payment of money only, and of alleging performance of conditions precedent in a contract are under §§ 198, etc., 183, etc.]

§ 851. *What instruments are within such a statute.*—The decisions on the construction and application of these statutes on demurrer, as to what instruments are within the statute, are generally applicable on questions of the admission of evidence at the trial.¹

Thus an instrument not within the statute—such as a judgment,² or mere order for part of the goods for the price of which the suit was brought,³ or a collateral agreement not qualifying the obligations sued on,⁴ or a mere instrument of title,⁵ or any other instrument upon which the action is not founded⁶—is admissible in evidence if otherwise competent, although not filed as an exhibit.

¹ See § 234, etc., DEMURRER, *Documents*.

² *Campbell vs. Wolf*, 33 *Mo.*, 549. (Transcript admitted, although not filed with the pleading.)

³ *Kingsland & F. Mfg. Co. vs. St. Louis M. I. Co.*, 29 *Mo. App.*, 526.

⁴ *Sexton vs. Wood*, 17 *Pick. (Mass.)*, 110.

Dunning vs. Rumbaugh, 36 *Iowa*, 566. (Suit on a promissory note written on the back of an agreement, and expressed to be due "on the within contract." *Held*, that the contract was not the foundation of the suit, and was admissible in evidence, though not made an exhibit.)

Buhl vs. Trowbridge, 42 *Mich.*, 44. (A receipt written upon a note for a part of the amount, and a memorandum that it has been protested for non-payment, are no part of the note, and need not appear in the copy served with the declaration in a suit on it.)

Parker vs. Brooks, 16 *Ill.*, 64. (Instrument abandoned, not foundation of action for money received.)

⁵ *Parker vs. Brooks*, 16 *Ill.*, 64.

Boardman vs. Beckwith, 18 *Iowa*, 292.

§ 852. *Object of the Statutes.*—In some of the States the object of these regulations is merely discovery or disclosure of the document, and the exhibit annexed or filed is not deemed part of the pleading.

In others, the object is to supply the place of profert and oyer by adopting the equity practice of annexing exhibits as a part of the pleading, making this compulsory in specified classes of cases.

The statute or rule of each State is construed and applied in view of the object thus intended.

[For admission by unverified denial, see page 507.]

In the following list, States where the statute has the effect to make the exhibit a part of the pleading are in italics.

<i>Arkansas</i> (written evidence of indebtedness),	Michigan (bills and notes, under money counts),
Delaware (written instruments for payment of money),	<i>Mississippi</i> (open accounts, and writings),
Florida,	Missouri,
Illinois,	<i>Nebraska</i> (account or written evidence of indebtedness),
<i>Indiana</i> ,	<i>New Jersey</i> ,
<i>Iowa</i> (account or written evidence of indebtedness),	New Mexico,
Kansas (account or written evidence of indebtedness),	<i>Ohio</i> (account or written evidence of indebtedness),
<i>Kentucky</i> (written evidence of indebtedness),	<i>Pennsylvania</i> ,
Louisiana,	Washington,
Massachusetts (dependent on the direction of the Court),	<i>Wyoming</i> (account or written evidence of indebtedness).

The statutes are as follows :

Arkansas—*Mansfield's Dig.*, § 5063 (*Civ. Code*, § 138, as amended 1871). "If the action, counterclaim or set-off is founded on a note, bond, bill or other writing as evidence of indebtedness, the original, or a copy thereof, must be filed as part of the pleading, if in the power of the party to produce it. If not filed, the reason thereof must be stated in the pleading. If upon an account, a copy thereof must, in like manner, be filed with the pleading."

Mansfield's Dig., § 5064 (*Civ. Code*, § 148, as amended 1871). "If either party shall rely upon any deed or other writing, he shall file with his pleading the original deed or writing, if in his power, or a copy thereof. If he can not procure such deed or writing, or a copy thereof, he shall so state in his pleading, together with the reasons therefor; and if such reasons are sufficient, he may file the best evidence of the contents of such deed or writing in his power. Original deeds and other writings, filed by either party, shall remain on file for the inspection of the other party until allowed by the Court to be withdrawn, and in such cases copies, attested by the clerk, shall be substituted by the parties withdrawing the original."

Delaware—*Rev. Code*, 1874, p. 645, c. 106, § 4. "In all actions in the Superior Court upon bills, notes, bonds, or other instruments of writing for the payment of money, . . . judgment by default shall be entered upon motion by the plaintiff or his attorney on the last day of the regular term, . . . provided that no judgment shall be entered by virtue of this section unless the plaintiff, or, if there be more than one, some one or more of the plaintiffs shall, on or before the first day of the term to which the original process is returnable, file in the office of the prothonotary a copy of the instrument of writing, . . . with an affidavit stating the sum demanded, and that he or they verily believe that the same is justly and truly due." . . .

Florida—*McClellan's Dig.*, p. 817, c. 162, § 30. "All bonds, notes, bills of exchange, covenants, and accounts, upon which suit may be brought, or a copy thereof, shall be filed with the declaration."

Illinois—*Rev. Stat.*, c. 110, ¶ 18 (*Cothran's Ann. ed.*, p. 1094); 2 *Starr & C. Ann. Stat.*, p. 1783. "If the plaintiff shall not file his declaration, together with a copy of the instrument of writing or account on which the action is brought, in case the same be brought on a written instrument or account, ten days before the Court at which the summons or *capias* is made returnable, the Court, on motion of the defendant, shall continue the cause at the cost of the plaintiff," . . .

Rev. Stat., chap. 110, ¶ 32 (*Cothran's Ann. ed.*, p. 1098); 2 *Starr & C. Ann. Stat.*, p. 1797. "If the defendant shall plead or give notice of any set-off, he shall file with such plea or notice a copy of the instrument or account upon which he intends to rely."

Rev. Stat., chap. 110, ¶ 20 (*Cothran's Ann. ed.*, p. 1095); 2 *Starr & C. Ann. Stat.*, p. 1786. "It shall not be necessary, in any pleading, to make profert of the in-

strument alleged ; but in any action or defence upon an instrument in writing, whether under seal or not, if the same is not lost or destroyed, the opposite party may have over thereof, and proceed thereon in the same manner as if profert had been properly made according to the common law."

Indiana—*Rev. Stat.*, chap. 2, § 362. "When any pleading is founded on a written instrument or on account, the original, or a copy thereof, must be filed with the pleading. A set-off or a counterclaim is within the meaning of this section. Such copy of a written instrument, when not copied in the pleadings, shall be taken as part of the record. The account, if the items are numerous, shall not be copied in the pleadings, nor be deemed to be a part of the record, unless by order of the court. Any variance between any pleading and copy of a written instrument filed, as to matter of description or legal effect, may be amended at any time (as of course) before judgment, without causing a continuance."

Iowa—*Code*, § 2648. "The defendant may demur to the petition only where it appears . . . 6. That, . . . [among other things], if founded on an account, or writing as evidence of indebtedness, and neither of such writings, account, or copy thereof is incorporated into or attached to such pleading, or a sufficient reason stated for not doing so."

Kansas—*Comp. Laws of 1885*, p. 620, tit. *Civil Procedure*, § 118. "If the action, counterclaim or set-off be founded on account or on a note, bill, or other written instrument, as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading. If not so attached and filed, the reason thereof must be stated in the pleading. But if the action, counterclaim, or set-off be founded upon a series of written instruments executed by the same person, it shall be sufficient to attach and file a copy of one only, and in succeeding causes of action or defences, to set forth in general terms descriptions of the several instruments respectively."

Kentucky—*Civ. Code*, § 120. "If an action, counterclaim, set-off, or cross-petition be founded on a note, bond, bill, or other writing, as evidence of indebtedness, it must be filed as a part of the pleading, if in the power of the party to produce it; and if not filed, the reason for the failure must be stated in the pleading: if upon an account, a copy thereof must be filed with the pleading."

Louisiana—*Code of Practice*, Art. 174. "When the action is founded on a notarial or public act, an authenticated

copy must be annexed to the petition, in order that it may be communicated to the defendant, if he require it; but it shall not be necessary to serve the same on the defendant."

Art. 175.—"But if the title on which the demand is founded be an act under private signature, or a note bearing the signature of the defendant, it shall not be necessary to annex to the petition the original of such an act, or the note itself, provided that if the defendant pray a view or oyer of the document declared upon, the court shall order the same to be filed within a reasonable delay, and in default of the plaintiff's complying with said order, his petition shall be dismissed."

Massachusetts, Pub. Stat. (1882), p. 964, c. 167, § 2, cl. 9.—

"All written instruments, except policies of insurance, shall be declared on by setting out a copy or such part as is relied on, or the legal effect thereof, with proper averments to describe the cause of action. If the whole contract is not set out, a copy or the original, as the court may direct, shall be filed on motion of the adverse party. Where it may be necessary, the copy so filed shall, if the court so orders, be part of the record, as if oyer had been granted of a deed declared on according to the common law. No profert or excuse therefor need be inserted in a declaration. If the instrument relied on is lost or destroyed, or is not in the power of the party who relies on it, he shall state the substance of it as nearly as he can, and the reason why a copy is not given."

§ 22. "Written instruments, when relied on in an answer or subsequent allegation, shall be set out, or copies or the originals shall be filed, in the manner prescribed in the ninth clause of section two when they are declared on."

§ 2, cl. 10. "When a bond, or other conditional obligation, contract, or grant, is declared on, the condition shall be deemed part of the obligation, contract, or grant, and shall be set forth. . . ."

§ 23. "When a conditional obligation, contract, or grant is relied on in an answer or subsequent allegation, the condition shall be deemed a part of the instrument, and similar averments shall be required in pleading on the same as are required by the tenth clause of section two."

Michigan—How. Ann. Stat., § 7346. "The plaintiff in . . . all . . . actions on bills of exchange or promissory notes, may declare upon the money counts alone, and any such bill or note may be given in evidence under money counts, in all cases where a copy of the bill or note shall have been served with the declaration. . . ."

Mississippi—Rev. Code (1880), § 1540. "There shall be

annexed to or filed with the declaration in every case founded on an open account, a copy of the account or bill of particulars of the demand; and in actions founded on any writing, a copy of such writing with the names of the subscribing witnesses, if any, shall be annexed to or filed with the declaration; and no evidence thereof shall be given on the trial, unless so annexed or filed; and the same shall be copied in the final record of the cause, and constitute part of the record thereof."

§ 1541. "A copy of any writing of which profert is made, or ought to be made, in any pleading, shall be annexed to, or filed with said pleading, with the names of the subscribing witnesses, if any, and no evidence thereof shall be given at the trial, unless so annexed or filed; and every writing filed with any pleading, as part of it, shall thereby be made a part of it, and be so considered for all purposes of the action."

Missouri—1 *Rev. Stat.* (1889), p. 548, § 2087. "An action or defence may be maintained on any instrument of writing, notwithstanding it may be lost or destroyed, and in every such action or defence it shall be sufficient for the party to allege the loss or destruction thereof, as an excuse for the want of such* filing."

§ 2088. When any petition, or other pleading, shall be founded upon any instrument of writing charged to have been executed by the other party, or his testator or intestate, or other person represented by such party, and not therein alleged to be lost or destroyed, the same, or a copy thereof, verified by the affidavit of the party, shall be filed with said petition or other pleading: *Provided*, that the court may, when good cause is shown, require the production of the original when the same is not filed with such pleading, before the opposite party shall be required to plead."

§ 2089. "Original deeds and other writings relied on by either party and filed as exhibits shall remain on file for the inspection of the other party, until allowed by the court, judge or clerk thereof, in vacation to be withdrawn, and, in such case, copies attested by the clerk shall be substituted by the party withdrawing the original."

Nebraska—*Comp. Stat.* (1887), p. 756; *Code Civ. Pro.*, § 124. "If the action, counterclaim, or set-off be founded

* These three sections were brought down from R. S. of 1855, where this § 2087 seems to have been first enacted, but its wording was different, as follows " . . . ; and in every such action or defence, such instrument shall not be required to be filed, but the party shall allege the loss or destruction, as an excuse for the want of such filing." It was so copied in Gen. St. of 1866, and changed as here copied, in R. S. of 1879, when the word "such" was probably left in through inadvertence.

on an account, or on a note, bill, or other written instrument, as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading, except in actions founded upon notes issued to circulate as money. If not so attached and filed, the reason thereof must be shown in the pleading."

New Jersey—Revision (1877), p. 867, § 123. "If any writing, whereof a copy is annexed to the declaration, plea, or notice of set-off, or other notice, be referred to in the body of the pleading as so annexed, the said copy shall cure any defect by reason of not setting forth the same, or the insufficient setting forth of the same, in the body of the declaration, plea, notice of set-off, or other notice; and in all cases where any copy of a writing signed by a party to the same shall be so annexed and referred to, the same shall be recorded with the pleadings, and form part of the record."

New Mexico—Comp. Laws (1884), § 1921. "When any instrument of writing upon which the action or defence is founded is referred to in the pleadings, the original or a copy thereof shall be filed with the pleading, if within the power or control of the party wishing to use the same, and if such original or a copy thereof be not filed as herein required, or a sufficient reason given for failure to do so, such instrument of writing shall not be admitted in evidence upon the trial."

Ohio—Rev. Stat. (1890), § 5085. "When the action, counterclaim, or set-off is founded on an account, or on a written instrument as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading; and if not so attached and filed, the reason for the omission must be stated in the pleading."

Pennsylvania—see p. 517. *Murdock vs. Martin*, 132 *Pa. St.*, 36; s. c., 18 *Atl. Rep.*, 1114.

Washington—Code (1881), § 93. "It shall not be necessary for a party to set forth in a pleading a copy of the instrument of writing, or the items of an account therein alleged; but unless he file a verified copy thereof with such pleadings, and serve the same on the adverse party, he shall, within ten days after a demand thereof, in writing, deliver to the adverse party a copy of such instrument of writing, or the items of an account, verified by his own oath, or that of his agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof."

[Power to require a further account, and to order a bill of particulars is also given.]

Wyoming—Rev. Stat. (1887), § 2472. "When the action, counterclaim, or set-off is founded on an account or on

a written instrument as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading, and if not so attached and filed, the reason for the omission must be stated in the pleading."

§ 2640. "Either party, or his attorney, shall, if required, deliver to the other party, or his attorney, a copy of any instrument of writing whereon the action or defence is founded, or which he intends to offer in evidence at the trial; and if the plaintiff or defendant refuse to furnish the copy required, the party so refusing shall not be permitted to give in evidence at the trial the original, of which a copy has been refused; but this section shall not apply to a paper, a copy of which is filed with a pleading, as provided in section twenty-four hundred and seventy-two."

§ 853. *Amended pleading*.—If the case is tried upon an amended pleading it is sufficient to let in the instrument if the pleader furnished the exhibit with the amended pleading;¹ but it is not enough that he furnished it with the original if he did not furnish it with the amended pleading.²

¹ State, Hudson, *vs.* Miller, 16 *Mo. App.*, 539.

² See § 253, *DEMURRER.

§ 854. *Replication*.—It is not enough, in an action founded on a written instrument, even though the complaint do not allege it to be such, that the exhibit was furnished with the replication.

[But compare § 247, DEMURRER.]

Miller *vs.* Grand Grove, 9 *Mo. App.*, 585.

§ 855. *Language*.—An original in a foreign language is receivable in evidence if a translation was furnished as an exhibit under the statute, instead of a copy in the foreign language.

Christenson *vs.* Gorsch, 5 *Iowa*, 374. (Holding it error to exclude the original. The English language proper

for all pleadings. But it would be plaintiff's duty to show that the translation was correct.)

§ 856. *Exclusion of evidence for not furnishing exhibit.*—In the absence of anything indicating the contrary,¹ in the statute or rule of court, a party who, notwithstanding the omission of his adversary to furnish an exhibit in a case where it is required by the statute or rule, as a part of the pleading, has pleaded in response either admitting² or denying³ the instrument, may be held to have waived the objection, and cannot insist that the omission to furnish the exhibit is a ground for excluding the instrument when offered in evidence by his adversary.

But the exclusion of a written instrument for such reason does not exclude oral evidence of other facts which may support the same claim.⁴

¹ As, in the rule in *Dill vs. Knapp*, 1 *Mona. Pa. S. Ct. Cas.*, 77; s. c., 16 *Atl. Rep.*, 767.

s. p., *Lee vs. Keister*, 11 *Iowa*, 480.

² *Cummings vs. Kohn*, 12 *Mo. App.*, 585. (Execution of note sued on admitted.)

³ *Grier vs. Gibson*, 36 *Ill.*, 521. (The point here decided was that a motion for continuance on the ground of plaintiff's disregard of the statute is too late after pleading to the action.)

Morgan vs. Gaar, Scott & Co., 64 *Ind.*, 213.

In *White vs. Stevens*, 13 *Mo. App.*, 240, it was held that the omission to comply with the statute was waived if not taken by demurrer or by objection to the evidence.

In *State, Gilbert, vs. Eldridge*, 65 *Mo.*, 584, it was held that objection to introduction of any evidence, and motion in arrest are not proper remedies for failure to file instrument sued on, where the petition alleges no excuse for the failure, and states a good cause of action.

s. p., *Waterman vs. Mattair*, 5 *Fla.*, 211; *Howe vs. South Park Com.*, 119 *Ill.*, 101; s. c. as *Howe vs. Frazier*, 7 *North East. Rep.*, 481.

⁴ *Graham vs. Whitely*, 26 *N. J. L.*, 254. (Here in ejectment plaintiff's bill of particulars specified, as his documentary evidence, several deeds and a will, but did not state whether he intended to claim by devise or descent.

Held, not error to allow him to give parol proof of title by descent. The provision of *N. J. Prac. Act* 1855, § 56, that the party can introduce only such documentary evidence as he specifies, does not preclude parol proof of title otherwise derived.)

Filing the original as an exhibit satisfies a statute requiring a copy to be filed as an exhibit. *Reed vs. Arnold*, 10 *Kan.*, 102.

§ 857. *Contract not alleged to be in writing.*—If neither party alleges that the contract sued on was in writing, and neither annexes or files a copy, defendant cannot put the writing in evidence.

[But see § 247, DEMURRER.]

Morgan vs. Gaar, Scott & Co., 64 *Ind.*, 213.

§ 858. *Variance between original and allegation or exhibit.*—Where the exhibit has been effectually made a part of the pleading pursuant to the statute, a question of variance arising upon the offer of the original in evidence is to be determined by comparing it with the exhibit; and if it agrees with that, a variance between the original and the allegations of the pleading is not material. The exhibit lets in the original, although it be variant from the allegation.¹

Where the exhibit is not made part of the pleading, a question of variance is to be determined by comparing the original with the allegations, and if it agrees with them a variance from the exhibit is not material.²

In either case a variance may be disregarded or cured by amendment at the trial, upon the same principles as in case of an ordinary pleading.³

¹ *Rugely vs. Goodloe*, 7 *La. Ann.*, 294; *Hughes vs. Harrison*, 7 *Mart. N. S. (La.)*, 227.

Glenn vs. Porter, 72 *Ind.*, 525.

Madera vs. Jones, *Mor. (Iowa)*, 204; *Walker vs. Ayres*, *id.*, 200.

² *Archer vs. Claffin*, 31 *Ill.*, 317; *Lee vs. Mendel*, 40 *id.*, 359; *Home Flax Co. vs. Beebe*, 48 *id.*, 138.

Clary vs. Thomas, 103 *Mass.*, 44.

³ For illustrations of this principle see *Stratton vs. Henderson*, 26 *Ill.*, 68.

Blossom vs. Ball, 32 *Ind.*, 115.

Tapley vs. Goodell, 122 *Mass.*, 176. (An allegation of a joint and several bond executed by the defendants, of which a copy is annexed, lets in evidence of such a bond executed by the defendants and others.)

§ 859. *Exhibit not evidence as such.*—Copies filed pursuant to the statute are not thereby made evidence in favor of the pleader; nor are the originals, unless read to the jury as such.

Richardson vs. Williams, 37 *Ark.*, 542.

§ 860. — *but admissible as evidence against the pleader*—If an exhibit has been effectually made part of the pleading, the adverse party may put it in evidence against the pleader;¹ unless it is the foundation of the case of such adverse party, and he has failed to comply with the statute.²

¹ *Markoe vs. Seaver*, 2 *Wisc.*, 148.

² See § 236, DEMURRER.

C. *Effect of Statutes and Rules of Court requiring Verified Denials of Written Instruments, and Particular Facts.*

[The effect of these statutes as affecting the issues is more fully stated under DEFINING THE ISSUES. The rules here stated relate rather to the actual production of evidence.]

§ 861. *Sworn denial not evidence for the pleader.*—The affidavit or verified pleading furnished pursuant to the statute is not, as such, evidence for the party interposing the denial.

Walter *vs.* Trustees of Schools, 12 *Ill.*, 63.

City Bank *vs.* Foucher, 9 *La. O. S.*, 405. (The affidavit of denial, though alleging forgery, will not be permitted to go to the jury as evidence, when not made the basis of some preliminary or interlocutory proceeding.)

§ 862. *Want of consideration.*—Where the statute merely shifts the burden of proof as to execution, the omission to verify the denial does not preclude the defendant from impeaching the consideration of the instrument, even though consideration appears on the face of the instrument.¹

It may be otherwise where the statute makes the failure to verify the denial equivalent to an admission.²

¹ *Stacker vs. Hewitt*, 2 *Ill.* (1 *Scam.*), 207.

Freeman vs. Ellison, 37 *Mich.*, 459.

In *Prescott vs. Johnson*, 8 *Fla.*, 391, it was held that where a promissory note has been negotiated before due, under circumstances which, at common law, allow inquiry into its consideration, the same inquiry may be made under a sworn plea of failure of consideration, under the statute.

² *Kelly vs. Mathews*, 5 *Ark.*, 223.

Pierce vs. Wright, 33 *Tex.*, 631.

§ 863. *Signing as agent.*—Under a statute requiring a sworn denial, an unsworn denial will not let in extrinsic evidence that defendant signed merely as agent, binding his principal and not himself, nor put the burden on plaintiff as to that fact.

McWhorter vs. Lewis, 4 *Ala.*, 198.

§ 864. *Alterations.*—Whether one who has not under oath denied a written instrument, can, under a statute requiring sworn denial, prove an alteration, see:

Affirmative.—*Mahaiwe Bank vs. Douglass*, 31 *Conn.*, 170; *Lake vs. Cruikshank*, 31 *Iowa*, 395; *Cape Ann Nat. Bank vs. Burns*, 129 *Mass.*, 596; *Ames vs. Quimby*, 106 *U. S.*, 342; s. c., *abstr.*, 26 *Alb. L. J.*, 455; *Henderson vs.*

Wilson, 7 *Miss.* (6 *How.*), 65; Bigelow *vs.* Stilphen, 35 *Vt.*, 521; Schwalm *vs.* McIntyre, 17 *Wisc.*, 232; Low *vs.* Merrill, 1 *Pin.* (*Wisc.*), 340.

In *Ela vs. Sprague*, 4 *Chand.* (*Wisc.*), 52; s. c., reprinted in 3 *Pin.*, 323, a denial (in a justice's court) as to execution, qualified so as to be merely a denial of having signed the instrument "as it reads above," was held not a denial of execution.

Negative.—Campbell *vs.* Larmore (*Ala.*, 1889, 4 *South. Rep.*, 593; Thackaray *vs.* Hanson, 1 *Colo.*, 365; Tedlie *vs.* Dill, 2 *Ga.*, 128; Dewey *vs.* Warriner, 71 *Ill.*, 198; Lowman *vs.* Aubery, 72 *Ill.*, 619; Woollen *vs.* Whitacre, 73 *Ind.*, 198; Hemphill *vs.* Bank of Alabama, 14 *Miss.* (6 *Smed. & M.*), 44; Archer *vs.* Ward, 9 *Gratt.* (*Va.*), 622 (but with dissent by ALLEN and DANIEL, JJ.).

[The better opinion is that if the statute can be construed as only relating to signature or execution, a defendant who by unsworn denial admits the signature may still rely on the ordinary rules of pleading and proof as to alterations in other parts of the instrument.]

§ 865. *Omission as affecting the issue:—dispensing with production.*—Whether production of the instrument is necessary or not, compare:

Affirmative.—Moore *vs.* Leseur, 18 *Ala.*, 606. (Holding that if, when produced, it varies from that described in the declaration, defendant may move to reject it, or test its legal sufficiency by demurrer to the evidence.)

New York, etc., *R. R. Co. vs. Hunt*, 39 *Conn.*, 75.

Potter *vs.* Earnest, 51 *Ind.*, 384; Glenn *vs.* Porter, 49 *id.*, 500; Fosdick *vs.* Starbuck, 4 *Blackf.* (*Ind.*), 417.

Able *vs.* Chandler, 12 *Tex.*, 88; Matossy *vs.* Frosh, 9 *id.*, 610.

Negative.—Henry *vs.* Evans, 58 *Iowa*, 560.

Williams *vs.* Norton, 3 *Kans.*, 295; Gaylord *vs.* Stebbins, 4 *id.*, 42; Reed *vs.* Arnold, 10 *id.*, 102.

Lorscher *vs.* Supreme Lodge Knights of Honor, 72 *Mich.*, 316; s. c., 2 *Law R. Anno.* 206; s. c., 40 *North West. Rep.*, 545.

See also § 849.

§ 866. — *allowing evidence.*—Where the statute makes the failure to comply equivalent to an admission,¹ it is

not error to receive in evidence against objection an instrument, the execution of which has been duly alleged,² and not denied in the manner prescribed by the statute.³

It is error to receive against objection evidence in support of the defective denial of the instrument.⁴

¹ For the statutes, see § 615, DEFINING THE ISSUES.

² Plaintiff's disregard of a statute requiring filing (see § 852) precludes him from claiming that omission to deny under oath admits execution. *Newton vs. Principal* (*Mich.*, 1890), 46 *North West. Rep.*, 234.

³ *Ferguson vs. Tutt*, 8 *Kans.*, 370.
s. p., *Benedict vs. Maynard*, 6 *McLean*, 21.
County of Ralls vs. Douglass, 105 *U. S.*, 728.
s. p., *Gaddy vs. McCleave*, 59 *Ill.*, 182.

⁴ *Johnston vs. Winfield Town Co.*, 14 *Kans.*, 390.

Under the California statute which declares the effect of non-verification to be an admission of the "genuineness and due execution," the truth of the statements in it (except perhaps mere recitals), and that the parties executed it in the capacity in which they appear to have acted, is held admitted. *Sloan vs. Diggins*, 49 *Cal.*, 38. But the relevancy of the instrument to the case is not admitted, nor the fact that the transactions alleged in the pleading were had under the instrument alleged. *Fox vs. Stockton Combined Harvester & Agri. Works*, 73 *Cal.*, 273; s. c., 15 *Pacif. Rep.*, 430.

§ 867. — *admitting validity.*—Where the statute relating to denial of execution may be construed as referring to the facts of signature and delivery, rather than to validity of execution, omission to verify does not preclude the party from proving facts which are consistent with signature and delivery, but show the invalidity of the instrument, as for instance by reason of the incapacity of the signer as a bankrupt,¹ or married woman,² or by reason of fraud which induced the signature.³

¹ *Birch vs. Tillotson*, 16 *Ala.*, 387.

² *Kenton Ins. Co. vs. McClellan*, 43 *Mich.*, 564.

³ *Nielson vs. Schuckman*, 53 *Wis.*, 638; s. c., 11 *North West. Rep.*, 44. [*Compare* § 868.]

§ 868. — *fraud inducing execution*.—If the execution of the instrument is effectually denied, defendant may show that its execution was induced by fraud on the part of plaintiff, or of those in privity with whom he stands, such as to render it absolutely void *ab initio*, at common law, even though the fraud is not specially pleaded.¹

If the execution of the instrument is in effect admitted, although the admission be coupled with an allegation that its execution was fraudulently obtained, the instrument may be read in evidence without proof.²

If the instrument is pleaded by defendant, as constituting a defence, the statutory traverse which the Code makes for all new matter pleaded merely as a defence, enables plaintiff to prove fraud although he has not put in a sworn denial of execution.³

¹ *Corby vs. Weddle*, 57 *Mo.*, 452. So also under the general issue (*non assumpsit*); *Strong vs. Linington*, 8 *Ill. App.*, 436. Otherwise perhaps of *non est factum*.

[*Contra*, under the Codes, see §§ 818–20, CONTRACTS.]

² *State vs. Homey*, 44 *Wisc.*, 615. (A surety in the bail bond sued on made affidavit that the bond was “misread and misexpounded” to him, and was not by him executed so as to become his bond. *Held*, proper to allow the bond to be read without proof of execution; and to refuse defendant leave to amend “so as to deny under oath the execution of said bond, but not to deny that the name attached was his signature.” Unless the signature is denied, plaintiff need not prove execution before offering instrument in evidence.)

S. P., Scandinavian Coal, etc., Co. vs. Whittaker, 40 *Kans.*, 123; *s. c.*, 19 *Pac. Rep.*, 330.

[The *contrary* rule was applied in *Coen vs. Funk*, 18 *Ind.*, 345, where the objection was merely the antedating of notes without authority; the Court saying that execution of the notes, as declared on, was admitted.]

In *Arnold vs. Trundle*, 7 *J. J. Marsh. (Ky.)*, 115, it was held that a special plea of such fraud need not be verified. In *Rothschild vs. Frensdorf*, 21 *Mo. App.*, 318, it was held that it must be, there being no sworn denial of execution.

* *Cox vs. N. W. Stage Co.*, 1 *Idaho*, 376.

Nielson vs. Schuckman, 53 *Wisc.*, 638; *abst.*, s. c., 8 *Weekly Cinn. Bul.*, 71.

§ 869. *Statutes affecting burden of proof—effect of unsworn denial.*—Where the statute merely shifts the burden of proof, if defendant has not duly verified his denial, plaintiff need not prove execution as a preliminary to reading the document in evidence, but defendant may, in his turn, adduce evidence to disprove it.

Sankey vs. Trump, 35 *Iowa*, 237; *Terhune vs. Henry*, 13 *id.*, 99; *Brayley vs. Hedges*, 52 *id.*, 623.

Lockbridge vs. Nuckolls, 25 *Ill.*, 178.

Bates vs. Hinton, 4 *Mo.*, 78.

Palmer vs. Yarrington, 1 *Ohio St.*, 253. (Holding that the statute precludes no proof, but merely dispenses with it, under certain conditions; and overruling *Taylor vs. Colvin*, *Wright (Ohio)*, 449.)

§ 870. — *Effect of sworn denial.*—Where the statute merely shifts the burden of proof, if defendant has duly verified his denial, plaintiff cannot put the instrument in evidence without common-law evidence of its execution;¹ but common-law evidence is sufficient;² and so is a due certificate of acknowledgment or proof under statutes authorizing that mode of proving documents.³

* *Miller vs. House*, 63 *Iowa*, 82.

Moore vs. Anderson, 11 *Miss.*, 321.

Lancashire Ins. Co. vs. Nill, 114 *Pa. St.*, 248. (Error to allow it.)

In *Cawood's adm'r vs. Lee*, 32 *Ind.*, 44, an administrator was held not to have waived proof of execution by suffering the instrument to be read in evidence without objection.

Counsel's promise to give the evidence afterward does not entitle him as matter of right to read the document before some proof its execution has been given. *Woolen vs. Wire*, 110 *Ind.*, 251; s. c., 9 *Western Rep.*, 82, 83. (Holding that this is matter of discretion.)

² *Sumpter vs. Geron*, 5 *Miss.*, 263.

Houston & T. C. R. Co. vs. Chandler, 51 *Tex.*, 416. (Ratification sufficient to supply lack of evidence of authority to sign.)

Brooks vs. Allen, 62 *Ind.*, 401. (Proof that defendant signed the note, and the fact that it is in plaintiff's possession, are *prima facie* evidence of its execution.)

Secondary evidence is competent after laying the proper foundation. *Griswold vs. Trustees Peoria University*, 26 *Ill.*, 41; *Jenkins vs. Parkhill*, 25 *Ind.*, 473.

In *Yeary vs. Cummins*, 28 *Tex.*, 91, and *Burleson vs. Burleson*, 15 *Tex.*, 423, the admission worked by the statute for want of a sworn denial was held to dispense with the necessity of the statutory acknowledgment and registration otherwise imperative for such instruments as those then in question.

[The rule that common-law evidence is sufficient does not apply in Louisiana, where the statute prescribes the necessary kinds of evidence. *Plicque vs. Labranche*, 9 *La. O. S.*, 559.]

[In *McDowell vs. Turney*, 5 *Sneed (Tenn.)*, 225, it was held that the common-law presumption that an officer has done his duty does not alone avail to let in a document in which the entry of the party's name was made by a public officer.]

³ *Wilkins vs. Moore*, 20 *Kan.*, 538.

§ 871. — *preliminary proof*.—A *prima facie* case of genuineness, though made by slight evidence, is enough to let the document be read in evidence.¹

This proof is addressed to the judge; but the party denying the execution is not entitled to give counter evidence on the question of admission² (unless perhaps by strict cross-examination of the adversary's witnesses); but his evidence in support of his denial must be offered as a part of his own case, after the reception of the document.

¹ "Where evidence addressed to the Court is adduced, making out a *prima facie* case of the authenticity of the note or other instrument, or reasonably tending, even slightly to prove the formal execution of it, such evidence is sufficient to entitle such note or other in-

strument to go to the jury." NIBLACK, J., in *Pate vs. First Nat. Bank*, 63 *Ind.*, 254.

¹ *Pate vs. First Nat. Bank* (above).

"DULY." [See also CONTRACT; JUDGMENT; and JURISDICTION.]

§ 872. *Substantial as well as formal conditions.*—"Duly" in an allegation not denied implies regularity both in form¹ and in substance.²

¹ *Rockwell vs. Merwin*, 45 *N. Y.*, 166. (Inserting "duly," at the trial lets in evidence of regularity.)

² *Brownell vs. Town of Greenwich*, 114 *N. Y.*, 518, 527; s. c., 24 *State Rep.*, 6. (Statement of facts submitted. *Held*, that the word "duly" implies the existence of every fact essential to jurisdiction of subject and person, and to regularity of procedure. Saying also, that the same conclusion would be reached by applying the analogy of the statute allowing judgments, etc., to be pleaded as "duly given or made.")

[See also conflicting cases on DEMURRER, under § 255.]

ELECTION (of rights, etc.). [See also CONTRACT.]

§ 873. *General allegation enough.*—Where notice of election is not necessary, a general allegation that the party "elected" to, etc., or not to, etc., with an appropriate designation of the subject of choice, lets in evidence of the manner in which the election was made.

Kramer vs. Cook, 73 *Mass.* (7 *Gray*), 550.

ENTRY. [See also EVICTION.]

§ 874. *Informal allegation.*—Entry and ouster need not be alleged in technical terms; but facts from which they are necessarily inferrible, so that the adverse party could not be misled, are enough.

Leprell vs. Kleinschmidt, 112 *N. Y.*, 364, 368; s. c., 21 *State Rep.*, 30, rev'g 17 *id.*, 231. (Allegation that defendant's buildings or eaves projected over the line,—a substantial allegation of entry and ouster to support ejectment.)

At Common Law an allegation of entry and ejecting lets in evidence of a constructive eviction. *Dyett vs. Pendleton* 8 *Cow.* (*N. Y.*), 727.

ESTOPPEL. [See also FORMER RECOVERY.]

§ 875. *Common-law estoppel.*

876. — reversal for invalidity.

877. — former adjudication; action pending.

§ 878. *Equitable estoppel*, in aid of plaintiff's case.

879. — defendant's case.

880. — plaintiff's avoidance of mere defence.

881. Incidental fact not pleaded.

§ 875. *Common-Law Estoppel.*—*Admissble though not pleaded.*—At Common Law and under the New Procedure a technical estoppel, whether by record,¹ or by writing under seal,² may be given in evidence although not pleaded. If not pleaded when the party had opportunity to plead it, it is only evidence, for argument to the jury; and it is error to exclude evidence from the adverse party on the question as to which it is sought to estop him.³

¹ *Richardson vs. Boston*, 19 *How* (*U. S.*), 263. (Applying the Massachusetts rule.)

Krekeler vs. Ritter, 62 *N. Y.*, 372 (leading case under *N. Y. Code*); *Terry vs. Munger*, 49 *Hun*, 560; s. c., 18 *N. Y. State Rep.*, 506; 2 *N. Y. Supp.*, 348, aff'd in 121 *N. Y.*, 161. [*Contra*, *Greaves vs. Middlebrooks*, 59 *Ga.*, 240.]

² *Lord vs. Bigelow*, 8 *Vt.*, 445, 461.

Mussey vs. White, 58 *Vt.*, 45; s. c., 3 *Atl. Rep.*, 319; 2 *New Engl.*, 64.

In *Clink vs. Thurston*, 47 *Cal.*, 21, a former adjudication not pleaded was held admissible on the ground that plaintiff had no opportunity to plead it, because the Code does not call for a reply to new matter. (Leading California case.) Followed in *Wixson vs. Devine*, 67 *Cal.*, 341; s. c., 7 *Pacif. Rep.*, 776.

³ *Doe vs. Huddart*, 2 *Cr. M. & R.*, 316; s. c., 5 *Tyrwh.*, 846.

§ 876. — *reversal for invalidity*.—One party having proved an adjudication as an estoppel, without having pleaded it, the other may prove that it was void *ab initio*; and in the case of an order in special statutory proceedings reversed because void, its voidness may be proved by producing the record of reversal without having pleaded reversal.

Briggs *vs.* Bowen, 60 *N. Y.*, 454.

§ 877. — *former adjudication ; action pending*.—An allegation of a former adjudication does not let in evidence of another action pending which has not reached adjudication.

Remington *vs.* Walker, 21 *Hun (N. Y.)*, 322.

§ 878. *Equitable estoppel in aid of plaintiff*.—At Common Law, an equitable estoppel may be proved by plaintiff though not alleged in the declaration or replication ;¹ and by defendant though not alleged in his plea.²

In Equity,³ and (according to the better opinion) under the New Procedure, where plaintiff relies on facts raising an equitable estoppel as sufficient to sustain an essential part of his case, by precluding evidence to the contrary, he cannot give evidence of those facts for that purpose, unless he has pleaded them.⁴ In New York this rule is not yet settled.⁵

¹ Phila., Wilm., etc., *R. R. vs. Howard*, 13 *How. (U. S.)*, 307, 340 ; s. c., 14 *Law. ed.*, 157.

Hawley vs. Middlebrook, 28 *Conn.* 527.

Welland Canal Co. vs. Hathaway, 8 *Wend. (N. Y.)*, 480, 483. (With *dictum* that it cannot be pleaded.)

² *Kirk vs. Hamilton*, 102 *U. S.*, 68. (Holding that is a defence at law as well as in equity.)

³ *Appeal of Thompson*, 126 *Pa. St.*, 367 ; s. c., 17 *Atl. Rep.*, 643.

Blandy vs. Griffith, 3 *Fish. Pat. Cas.*, 609.

- * The reasons for this rule are, that under the New Procedure the complaint must state the facts constituting the cause of action; and that to give defendant notice that he must be prepared to try the question of the main fact, when it is only intended to prove that he is not entitled to try that question, does not fulfil the true purpose of pleading.

In support of the view that to form an essential part of the cause of action in proof it must have been pleaded, see *Delphi vs. Startzman*, 104 *Ind.*, 343; s. c., 3 *North East. Rep.*, 937; *Ransom vs. Stanberry*, 22 *Iowa*, 334; *Phillips vs. Van Schaick*, 37 *Iowa*, 229; *Eikenberry vs. Edwards*, 67 *id.*, 14, 19; s. c., 24 *North West. Rep.*, 570; *Hammerslough vs. Cheatham*, 84 *Mo.*, 13 (*dictum* that it must always be pleaded); *Oregonian Ry. Co. vs. Oregon Ry. & Nav. Co.*, 22 *Fed. Rep.*, 245, 249.

Contra, compare *Hostler vs. Hays*, 3 *Cal.*, 302; *Coleman vs. Pearce*, 26 *Minn.*, 123; *Lites vs. Addison*, 27 *S. C.*, 226; s. c., 3 *South East. Rep.*, 214; *Hayes vs. Virginia Mut. Protect. Ass.* 76 *Va.*, 225; *Cornhauser & Co. vs. Roberts*, 75 *Wisc.*, 554. And see *Paxton Cattle Co. vs. First Nat. B'k*, 21 *Nebr.*, 621.

- * See *Andrews vs. Ætna Life Ins. Co.*, 92 *N. Y.*, 596, 601; s. c., 16 *Weekly Dig.*, 169; and cases in note to next section.

§ 879. — *defendant's case.*—Under the New Procedure, if defendant relies on an equitable estoppel as essential to enable him to defeat plaintiff's case, he cannot prove the facts raising it unless he has pleaded them; and this rule applies whether the estoppel is claimed to conclude plaintiff from asserting his own case¹ or from denying defendant's new matter in avoidance.²

Upon the same principle, if plaintiff relies on an equitable estoppel to defeat a counterclaim he must plead it.³

In New York this rule is not yet settled.⁴

[The reasons are that under the New Procedure, where defendant may be required to answer on oath, he cannot allege the fact, if the only matter he relies on is an estoppel against proving the fact to be excluded; that

if the fact to be excluded once existed as part of the cause of action, and the estoppel afterward arose, it is new matter, and no more admissible under a general denial than payment or a release; and that in any case a mere denial of the fact sought to be concluded invites plaintiff to try the very issue which the claim of estoppel precludes him from trying. In practice in New York the question usually comes up on submission of the cause, and it is a question of surprise and amendment. See note 4, below.]

¹ Wood *vs.* Ostram, 29 *Ind.*, 177.

Johnson *vs.* Stellwagen, 67 *Mich.*, 10, 14.

Hanson *vs.* Chiatovich, 13 *Nev.*, 395.

Rugh *vs.* Ottenheimer, 6 *Oreg.*, 231.

Gill *vs.* Rice, 13 *Wisc.*, 613.

² Clarke *vs.* Huber, 25 *Cal.*, 593.

Dale *vs.* Turner, 34 *Mich.*, 405.

Bray *vs.* Marshall, 75 *Mo.*, 327.

Warder *vs.* Baldwin, 51 *Wisc.*, 450.

³ Burlington, etc., R. Co. *vs.* Harris, 8 *Nebr.*, 140.

⁴ Compare to the effect that defendant need not plead an equitable estoppel, Prevot *vs.* Lawrence, 51 *N. Y.*, 219; Rogers *vs.* King, 66 *Barb.* (*N. Y.*), 495; Creque *vs.* Sears, 17 *Hun* (*N. Y.*), 123; *Contra*, Dressler *vs.* Hard, 6 *N. Y. Supp.*, 500; s. c., 25 *N. Y. State Rep.*, 808.

§ 880. — *plaintiff's avoidance of mere defence.*—Under the New Procedure, where replications are disused, if plaintiff needs the aid of the estoppel not to establish his cause of action, but only to avoid new matter set up by defendant as constituting a defence, he may prove the facts which raise the estoppel, although he has not pleaded them.

Dyer *vs.* Scalmanini, 69 *Cal.*, 637; s. c., 11 *Pacif. Rep.*, 329.

Metrop. Life Ins. Co. *vs.* Meeker, 85 *N. Y.*, 614.

Gans *vs.* St. Paul Ins. Co., 43 *Wisc.*, 108.

Contra, Hayes *vs.* Virginia Mut. Ins. Co., 76 *Va.*, 225.

§ 881. *Incidental fact not pleaded.*—After evidence of an incidental fact not pleaded, has been adduced by

either party, the adverse party has a right, (subject, however, to objection on the ground of surprise) to give evidence showing that the other is equitably estopped from relying on the fact claimed.

Common practice: following the general principle that equitable estoppel need not be specially pleaded unless either the fact sought to be excluded has been specially pleaded [see § 880], or the estoppel is essential to the foundation of the party's case. See cases under §§ 878, 879.

FACTS OCCURRING PENDING THE ACTION. [See also § 69, DEMURRER FOR INSUFFICIENCY; § 495, SUPPLEMENTAL PLEADINGS; § 450, DEMURRER TO ANSWER; and § 1024, OBJECTIONS TO GROUNDS ARISING PENDING SUIT; ACTION PREMATURE.]

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|------------------------------------------------------------------------|-------------------------------------------------------------|
| § 882. Fact essential to the case. | mental pleading not evidence of right. |
| 882*. Exceptional actions. | |
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| 887. Leave to file amended or supplemental pleading. | 892. Repetition of same grievance. |
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§ 882. *Fact essential to the case.*—At Common Law,¹ and in actions of a legal nature under the New Procedure,² a fact essential to the case of the party offering to prove it, but which is not pleaded, cannot be proved even though it occurred after commencement of the action. This rule applies to equitable defences in legal actions.³

[Whether it is properly to be stated in an original, an amended, or a supplemental pleading, see §§ 495–499, DEMURRER TO SUPPLEMENTAL PLEADINGS.]

- ¹ *Yeaton vs. Lynn*, 5 *Pet. (U. S.)*, 224, 231.
Mount vs. Scholes, 120 *Ill.*, 394.
s. p., *Andrews vs. Hooper*, 13 *Mass.*, 472.
- ¹ *Hardy vs. Johnson*, 1 *Wall. (U. S.)*, 371.
Campbell vs. Fulmer, 39 *Kans.*, 409; *s. c.*, 18 *Pac. Rep.*, 493.
Collins vs. Ballow, 72 *Tex.*, 330; *s. c.*, 10 *South West. Rep.*, 248.
Styles vs. Fuller, 101 *N. Y.*, 622; *s. c.*, 3 *How. Pr. N. S.*, 464; *Cheeseman vs. Sturges*, 9 *Bosw. (N. Y.)*, 246, 259;
Hall vs. Olney, 65 *Barb. (N. Y.)*, 27.
- ¹ *Wisner vs. Ocumpaugh*, 71 *N. Y.*, 113.

§ 882^a. *Exceptional actions*.—Exceptions to the rule that facts occurring after the commencement of the action cannot avail, are to be found in actions of replevin,¹ *quo warranto*,² and mesne profits in ejectment.³

¹ Wells on Replev., 275, § 496.

² *People ex rel. Swinburne vs. Nolan*, 101 *N. Y.*, 539.

³ Whether it applies in *Equity or Equitable actions*, compare *Blaisdell vs. Stevens*, 16 *Vt.*, 179; *Peck vs. Goodberlett*, 109 *N. Y.*, 180, 189; *s. c.*, 15 *N. Y. State Rep.*, 182.

§ 883. *What is the time of commencing action*.—Under the New Procedure, where the process is issued by attorney, the suit is regarded as commenced at the time of the first service of the summons.¹

In those jurisdictions where the process is issued by the Court on the filing of the bill of complaint or petition, or upon formal application for the process, the filing of the pleading or the actual issue of the process is regarded as the commencement of the action;² but at Common Law, if it be shown that service was postponed until after demand and refusal, or other circumstance perfecting the cause of action, the action will not (for the purpose of excluding evidence) be deemed to have been commenced until service.³

¹ *Foxell vs. Fletcher*, 87 *N. Y.*, 476; *s. c.*, 14 *Weekly Dig.*, 298.

McCullough vs. Colby, 4 *Bosw. (N. Y.)*, 603. (So holding of service on one of several parties.)

[Compare Haines vs. Haines, 24 *N. Y. Weekly Dig.*, 267, allowing subsequent items in bill of particulars.]

* Sheridan vs. Cameron, 65 *Mich.*, 680 ; s. c., 32 *North West. Rep.*, 894.

Badger vs. Phinney, 15 *Mass.*, 359 ; s. c., 8 *Am. Dec.*, 105; Grimes vs. Briggs, 110 *Mass.*, 446.

It may be otherwise for the purpose of the Statute of Limitations (*N. Y. Code Civ. Pro.*, 399), or a provisional remedy (§ 416).

§ 884. *Fractions of a day.*—The Common-Law rule that the law will not regard fractions of a day, does not apply to the issue of process when it is not a judicial act.

Clarke vs. Bradlaugh (Eng. Ct. of App.), 30 *Weekly Rep.*, 53, dismissing appeal from L. R. 7 *Q. B. Div.*, 151; s. c., 29 *Weekly Rep.*, 823.

s. p., Wardell vs. Etter, 143 *Mass.*, 19 ; s. c., 7 *East. Rep.*, 858.

§ 885. *Lapse of time or further grievance enlarging measure of recovery.*—A fact which occurred after suit brought, if not necessary to make out the cause of action, may be proved by plaintiff for the purpose of showing that by the lapse of time,¹ or further persistence of defendant,² the facts which are alleged in the original complaint entitle plaintiff to an enlarged measure of the same relief as there demanded, provided he has duly alleged such later fact in a supplemental complaint.

¹ Fincke vs. Rourke, 20 *Hun (N. Y.)*, 264. (Subsequent instalments.)

Sigler vs. Gordon, 68 *Iowa*, 441 ; s. c., 27 *North West. Rep.*, 372.

[*Contra*, Bull vs. Rothschild, 16 *Civ. Pro. R. (N. Y.)*, 356 ; s. c., 4 *N. Y. Supp.*, 826 ; 22 *State Rep.*, 536. (Denying leave to file supplemental complaint.)]

² Jenkins vs. Leubscher, 6 *Weekly Dig. (N. Y.)*, 418. (Levy before suit commenced, and sale afterwards.)

§ 886. *Facts modifying or supporting a good cause of action.*—The plaintiff may, for the purpose of modifying or supporting his cause of action, prove facts material to the case originally presented, although they occurred after suit brought, provided he has duly pleaded them in a supplemental complaint.

For instance, see *Hobson vs. McArthur*, 16 *Pet.*, 182 (agreement made after suit brought); *Hasbrouck vs. Shuster*, 4 *Barb. (N. Y.)*, 285 (same); *Buckley vs. Buckley*, 12 *Nev.*, 423 (replevin for sheep: increase of the flock, and enhanced value of wool).

§ 887. *Leave to file amended or supplemental pleading not evidence of right.*—The order of Court giving one who claims to be a successor in interest to the original plaintiff leave to file a supplemental complaint for the purpose of prosecuting the action, is not an adjudication of his right to maintain the action.

Robbins vs. Wells, 18 *Abb. Pr. (N. Y.)*, 191; s. c., 26 *How. Pr.*, 15. Compare *Brief on the Facts*, § 175, p. 62.
[Compare *Badlam vs. Springsteen*, 41 *Hun (N. Y.)*, 160. (Holding an order refusing to strike out, conclusive at the trial. Unsound; see §§ 759, etc.)]

§ 888. *Amendment inserted in supplemental pleading.*—The objection that a supplemental pleading ought not to set forth facts which arose before the commencement of the action, if not taken by demurrer or answer, is not available at the trial to exclude evidence offered under the supplemental pleading.

Fulton Bank vs. N. Y. & Sharon Coal Co., 4 *Paige (N. Y.)*, 127.
Cincinnati vs. Cameron, 33 *Ohio St.*, 336.
State vs. Finn, 45 *Iowa*, 148.

Lowry *vs.* Harris, 12 *Minn.*, 255.

And see Wetmore *vs.* Truslow, 51 *N. Y.*, 338.

§ 889. *Waiver of objection that original is insufficient alone.*—If a supplemental complaint alleges a fact which occurred after the suit was brought, and which is essential to make out the cause of action attempted to be set up in the original complaint; and the defendant does not, either by opposing the leave to file such a complaint or by demurring, object that the cause of action had not accrued when the suit was commenced, but answers the supplemental complaint and goes to trial on the merits, he waives the objection, and cannot first raise it at the trial.

Lowry *vs.* Harris, 12 *Minn.*, 255, 267.

s. p., Green *vs.* Dunn, 5 *Kans.*, 254.

s. p., Pinch *vs.* Anthony, 10 *Allen (Mass.)*, 470.

§ 890. *Mere evidence.*—The rule that facts occurring after suit brought, and not alleged by supplemental pleading, cannot be proved, does not exclude facts which do not constitute part of the cause of action or defence, but are merely evidence; even though relied on as the proof of a fact essential to constitute the cause of action or defence.¹

This rule allows admitting evidence of a judgment or order of Court entered pending the cause, and amending a record or reforming an instrument involved in the cause.²

¹ Rodman *vs.* City of Buffalo, 15 *N. Y. State Rep.*, 583.

(Ratification after suit brought, of previous act.)

Spratt *vs.* Price, 18 *Fla.*, 289. (Deed having relation back.)

s. p., Jackson *vs.* Ramsay, 3 *Cow. (N. Y.)*, 75.

Schiffer *vs.* Adams, 13 *Colo.*, 572; *s. c.*, 22 *Pac. Rep.*, 964.

(Deed after suit, to fulfil contract made before suit.)

² Concordia Savings & Aid Ass. *vs.* Read, 14 *N. Y. State Rep.*, 8. (Adjudication before suit, and judgment-roll entered after suit.)

Peck *vs.* Vandemark, 99 *N. Y.*, 29, 35 (and note in 18 *Abb. N. C. (N. Y.)*, 158, aff'g 33 *Hun (N. Y.)*, 214. (Measure of recovery not ascertainable till afterwards.)

Clute *vs.* Knies, 102 *N. Y.*, 377. (Amendment of undertaking.

So of authentication, during the suit, of instrument previously executed. *Abb. Tr. Ev.*, 6, 505, 427.

For an extended discussion of the power of the Court to make such amendments, see *Boody vs. Watson*, 64 *N. H.*, 162; s. c., 4 *New Engl. Rep.*, 553.

§ 891. *Facts in avoidance of prima-facie defence.*—A fact which occurred after suit brought, if not essential to make out the alleged cause of action, plaintiff may prove without having pleaded, whenever it is necessary in avoidance of new matter not constituting a counterclaim of which defendant has given evidence.

Decker vs. Kitchen, 33 *Hun (N. Y.)*, 268. (New promise to defeat discharge.)

Butler vs. Jarvis, 51 *Hun (N. Y.)*, 248; s. c., 21 *N. Y. State Rep.*, 278; 4 *N. Y. Supp.*, 137. (Discontinuance of another proceeding.)

Mansfield vs. N. Y. Central, etc., 102 *N. Y.*, 205, 215. (Judgment as *res judicata*.)

Bank of Chicago, 127 *U. S.*, 484; s. c., 32 *Law. ed.*, 189. (Recovery for same cause.)

§ 892. *Repetition of same grievance.*—In an action, the gist of which is a trespass, or a nuisance which is not in itself continuous like the existence of a wrongful structure, but the continuance of which consists in the repetition of similar but independent acts on the part of defendant, such as the repeated fouling of a stream,—plaintiff cannot, for the purpose of making out his cause of action, show such continuance after suit brought, nor the commission, after suit brought, of acts alleged in the complaint to have been threatened,² unless he has alleged them in a supplemental complaint.³

¹ *Waterman vs. Buck*, 58 *Vt.*, 519; s. c., 3 *Atl. Rep.*, 505; s. c., 5 *Eastern Rep.*, 274.

[Compare *Meyer vs. Phillips*, 97 *N. Y.*, 485, 491.]

² *Third Ave. R. R. Co. vs. N. Y. Elevated R. R. Co.*, 19 *Abb. N. C. (N. Y.)*, 261.

³ But compare *Uline vs. N. Y. Central, etc., R. R. Co.*, 101 *N. Y.*, 98; s. c., 4 *North East. Rep.*, 536, and *Adams vs. Chicago, B. & N. R. Co.*, 39 *Minn.*, 286; s. c., 1 *Law. Rep. Ann.*, 493, 496. And see DAMAGES.

§ 893. *Amending*.—At Common Law, facts constituting a defence arising after suit brought might be set up by plea *puis darrein continuance*, if promptly interposed, and this was matter of right even at the trial.¹

Under the Codes of Procedure this practice is superseded; and facts arising after suit cannot be let in by amendment at the trial, but the remedy is to seek postponement and leave to plead. Leave is not to be granted at the trial.²

¹ *Field vs. Goodman*, 3 *Wend. (N. Y.)*, 310.

Sandford vs. Sinclair, 3 *Den. (N. Y.)*, 269.

Garner vs. Hannah, 6 *Duer (N. Y.)*, 262, 275. (The Code, prescribes a motion as the uniform method of obtaining leave to plead after time passed.)

² Otherwise sometimes if they have been proved without objection. *Fifth Nat. Bk. vs. N. Y. Elevated R. Co.*, 28 *Fed. Rep.*, 231.

FOREIGN LAW. [See also STATUTES.]

§ 894. Whether pleading the conclusion drawn from foreign law, instead of distinctly alleging the existence of the law as a general rule,—for instance, saying that by the law of, etc., it was defendant's duty to, etc., instead of saying that by such law it was the duty of all persons, etc.—suffices to let in evidence:—

Compare cases cited under §§ 259, 260, and *Roots vs. Merriwether*, 8 *Bush (Ky.)*, 397; *Templeton vs. Sharp (Ky., 1888)*, 9 *South West. Rep.*, 696; *Van Vranken vs.*

City of Schenectady, 31 *Hun* (N. Y.), 516; Beman *vs.* Tugnot, 5 *Sandf.* (N. Y.), 153; Graves *vs.* Cameron, 9 *Daly* (N. Y.), 152; Robarge *vs.* Central Vt. R. R. Co., 18 *Abb. N. C.* (N. Y.), 363.

As to judicial notice of sister State statutes, see cases cited under § 260, and Atchison, T. & S. F. R. Co. *vs.* Betts, 10 *Colo.*, 431; s. c., 15 *Pac.*, 821; Flanigen *vs.* Washington Ins. Co., 7 *Pa. St.*, 306; State of Ohio *vs.* Hinchman, 27 *id.*, 479; Paine *vs.* Schenectady Ins. Co., 11 *R. I.*, 411; Hobbs *vs.* Memphis, etc., R. Co., 9 *Heisk. (Tenn.)*, 873; Butcher *vs.* Bank of Brownsville, 2 *Kans.*, 70; Dodge *vs.* Coffin, 15 *id.*, 277; Morse *vs.* Hewett, 28 *Mich.*, 481.

FORMER RECOVERY. [See also ESTOPPEL.]

§ 895. *Necessity of pleading.*—At Common Law a former recovery duly authenticated is admissible in evidence under the general issue, as a bar.¹ Under the New Procedure it is new matter not admissible as a bar unless specially pleaded.² It is not enough that it appears by the complaint.³

¹ *Mason vs. Eldred*, 6 *Wall. (U. S.)*, 231, 234.

Whiting vs. Burger, 78 *Me.*, 287; s. c., 4 *Atl. Rep.*, 694, 696.

Marsh vs. Pier, 4 *Rawle (Pa.)*, 273, 288.

Gilchrist vs. Bale, 8 *Watts. (Pa.)*, 355. (Holding it admissible in an action on the case; but *dictum* that it is otherwise in actions of tort generally. The reason for the distinction is that an action on the case is regarded as of an equitable nature.)

Jones vs. Ellison, 10 *W. N. C. (Pa.)*, 205; s. c., 12 *Reporter*, 378.

Whitney vs. Clarendon, 18 *Vt.*, 252.

Jones vs. Lavender, 55 *Ga.*, 228.

[Otherwise of a recovery against a co-trespasser. 2 *Chitt. on Pl.*, 16 *Am. ed.*, 654.]

² *Hendricks vs. Decker*, 35 *Barb. (N. Y.)*, 298

Norris vs. Amos, 15 *Ind.*, 365.

If there is no opportunity to plead it, it may be proved. *Flandreau vs. Downey*, 23 *Cal.*, 354, 358; *Clink vs. Thurston*, 47 *id.*, 21, 29. It may be pleaded in an equitable action. *San Francisco vs. S. V. W. W.*, 39 *id.*, 473, 482.

It is the better opinion that even then it is sometimes a support to the action, and not a bar. See *Jenkins vs. International B'k*, 127 *U. S.*, 484.

¹ *Henderson vs. Scott*, 32 *Hun*, 413; s. c., 6 *Civ. Pro. (N. Y.)*, 39; s. p., *Brazill vs. Isham*, 12 *N. Y.*, 9, aff'g 1 *E. D. Smith*, 437.

FRAUD. [See also CONSPIRACY; CONTRACT; and INTENT. For sufficiency on demurrer, see DEMURRER, § 262, etc.]

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| § 896. General allegation. | etc., distinguished from fraud |
| 897. Principal and agent. | in inducing agreement. |
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| 901. The word "fraud" not necessary. | faith. |
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| 903. Oral evidence to defeat writ- | 908. Plaintiff in <i>pari delicto</i> . |
| ten. | 909. Fraud to rebut defence. |
| 904. Fraud in inducing signature, | |

§ 896. *General allegation, not sufficient for the pleader.*—A mere general allegation of fraud will not let in evidence of the facts constituting fraud, but the facts themselves must be alleged.¹

And where the facts are alleged, adding a general allegation such as "other false and fraudulent representations," does not let in evidence of such others.²

¹ *Hale vs. Walker*, 31 *Iowa*, 344.

s. p., *State vs. Williams*, 39 *Kans.*, 517.

Green vs. Hayes, 70 *Cal.*, 276; s. c., 11 *Pac. Rep.*, 716.

Southall vs. Farish, 85 *Va.*, 403; s. c., 1 *Law. R. Anno.*, 641; s. c., 7 *South East. Rep.*, 534.

Coulson vs. Whiting, 14 *Abb. N. C. (N. Y.)*, 60; s. c., 12 *Daly (N. Y.)*, 408.

Contra, *Goodsell vs. Trumbull*, 135 *Mass.*, 99.

² *Reed vs. Clark Cove Guano Co.*, 47 *Hun*, 411; s. c., 14 *N. Y. State Rep.*, 560.

§ 897. *Principal and agent.*—Fraudulent representations made by an agent are admissible under an allegation that they were made by the principal.¹ But an agent of

a corporation is not an agent of the officers or stockholders within the meaning of this rule.²

¹ *King vs. Fitch*, 2 *Abb. Ct. App. Dec.* (N. Y.), 508 ; s. c., 1 *Keyes* (N. Y.), 432.

² *Arthur vs. Griswold*, 55 N. Y., 400.

§ 898. *Intent essential*.—An allegation of fraud or deceit is not sufficient to let in evidence against objection if it does not state an intent to deceive.

Star Steamship Co. vs. Mitchell, 1 *Abb. Pr.* (N. S., N. Y.), 396.

§ 899. *Time*.—Allegations of fraudulent representations inducing sale, if they are general as to time, let in such representations made to induce credit in earlier purchases forming part of the same continuous course of dealing, and other such representations showing bad faith.

[For other authorities, see *Brief on the Facts*, "Fraud."] *Coffin vs. Hollister*, 31 *Hun*, (N. Y.), 81 [*citing King vs. Fitch*, 2 *Abb. Ct. App. Dec.* (N. Y.), 508 ; s. c., 1 *Keyes*, (N. Y.), 432].

Bissel vs. Russell, 23 *Hun* (N. Y.), 659. (Allegation as to "Oct. 1875 and prior thereto," evidence as to 1873.)

Thomas vs. Beebe, 25 N. Y., 244. (Representations after delivery of deed admissible to characterize those made before it.)

§ 900. *Knowledge of falsity*.—An allegation that defendant knowingly made a false representation does not let in evidence that he made false representations without knowledge.

Pearson vs. Howe, 1 *Allen* (Mass.), 207.

Marshall vs. Fowler, 7 *Hun* (N. Y.), 237.

Derry vs. Peek, *H. L. (E.) L. R.* 14 *App. Cas.*, 337, rev'g *Peek vs. Derry*, 36 *Weekly Rep.*, 899 ; s. c., *Law Rep.*, 37 ; *Ch. Div.*, 541.

§ 901. *The word "fraud" not necessary.*—An allegation of facts constituting fraud, lets in evidence of them, although it omits to charge fraud in general terms.

Hicks vs. Stevens, 121 *Ill.*, 186. (Action to rescind contract to purchase patent right for fraudulent representations.)

Sharp vs. Mayor, etc., of New York, 40 *Barb. (N. Y.)*, 256.
Whittlesey vs. Delaney, 73 *N. Y.*, 571.

§ 902. *Evidence not to be pleaded.*—The rule that the facts constituting fraud must be alleged, does not require a detail of circumstances. It is enough if the misrepresentation, the defendant's knowledge, and the plaintiff's ignorance and reliance are alleged in an issuable form.

If more be alleged, a variance in the circumstances is amendable.

Place vs. Minster, 65 *N. Y.*, 89, 99. Opinion by Professor Dwight, Com'r, at p. 99 (*Equity*), and 102 (*Common Law*).

Cummings vs. Thompson, 18 *Minn.*, 246.

Canton vs. McGraw, 67 *Md.*, 583; s. c., 16 *Washington Law Rep.*, 4.

§ 903. *Oral evidence to defeat written.*—The rule that oral evidence is not admissible to vary a writing does not exclude evidence of fraud in procuring its execution, if the fraud has been duly pleaded.

Mayer vs. Dean, 115 *N. Y.*, 556; s. c., 26 *N. Y. State Rep.*, 375.

Amer vs. Hightower, 70 *Cal.*, 440.

§ 904. *Fraud in inducing signature, etc., distinguished from fraud in inducing agreement.*—An allegation of

fraud in reducing a contract to writing does not let in evidence of fraud in inducing the original oral agreement.

Brainerd vs. Arnold, 27 *Conn.*, 617, 626.

§ 905. *Fraud does not let in rescission, etc.*—An answer merely alleging fraud in inducing the making of a contract does not let in evidence that the party has rescinded the contract on account of the fraud.

Fogg vs. Griffin, 84 *Mass.* (2 *Allen.*), 1.
s. p., *McLeod vs. Maloney*, 3 *N. Y. Supp.*, 617; *s. c.*, 20
N. Y. State Rep., 468.

§ 906. *Denial of allegation of good faith.*—Where the adverse party has pleaded affirmatively good faith, or facts showing the validity of the act to be impeached, a denial is sufficient to let in evidence of fraud showing the contrary.

Wager vs. Ide, 14 *Barb.* (*N. Y.*), 468.

§ 907. *Denial of concealment.*—Where the gist of the charge is fraudulent concealment, a general denial lets in evidence that the fact was communicated by defendant to plaintiff.

Howell vs. Biddlecum, 62 *Barb.* (*N. Y.*), 131.

§ 908. *Plaintiff in pari delicto.*—The fact that plaintiff was *in pari delicto* with defendant in a fraud committed by defendant in an act on which plaintiff relies, is not ground of defence unless pleaded by defendant.

Welfley vs. Shenandoah Iron, Lumber, Min. & Mfg. Co., 83 *Va.*, 768; *s. c.*, 3 *South East. Rep.*, 376.

§ 909. *Fraud to rebut defence.*—Under the New Procedure, replications to new matter not constituting a counterclaim being abolished, plaintiff may, without having pleaded it, prove fraud for the purpose of avoiding any such new matter which defendant has proved.

Argall vs. Jacobs, 87 *N. Y.*, 111; s. c., 13 *Weekly Dig.*, (*N. Y.*), 409. (Fraud in debt; to avoid bankruptcy discharge.)

Jones vs. Jones, 41 *Hun* (*N. Y.*), 163. (Fraud on creditors, in alleged gift set up as a defence.)

Leslie vs. Keepers, 68 *Wisc.*, 123; s. c., 31 *North West*. 486. (Fraud in written settlement.)

Contra in Equity, *Very vs. Levy*, 13 *How.* (*U. S.*), 345.

HEIR. [See also TITLE.]

§ 910. *Sufficient allegation to admit evidence.*—An allegation that on the death of one person the title descended to another as sole heir at law, lets in evidence that the latter was such heir.

St. John vs. Northrup, 23 *Barb.* (*N. Y.*), 25. (The Court saying that less strictness is required at the trial than on demurrer.)

s. p., *Wainman vs. Thompson*, 20 *N. Y. Weekly Dig.*, 68. Compare § 266, *Demurrer for insufficiency—heir.*

ILLEGALITY. [See also CONTRACT.]

§ 911. Illegality on face of instrument. § 913. Variance as to nature of illegality.

912. Evidence of illegality under a denial. 914. Illegality of counterclaim.

§ 911. *Illegality on face of instrument.*—The instrument sued upon is not admissible in evidence against a denial, if illegal upon its face,¹ unless evidence removing the objection is promised.

¹ *Handy vs. St. Paul Globe Pub. Co.*, 41 *Minn.*, 188.

§ 912. *Evidence of illegality under a denial.*—At Common Law the illegality of the contract sued on may be shown under a general denial.¹

Under the New Procedure, a denial of the contract does not let in evidence of illegality not forming a part of the contract or entering into its terms.² But this rule does not preclude defendant from showing under such denial what the true contract was, merely because such evidence may show that the contract is illegal.³

¹ *Craig vs. Missouri*, 4 *Pet. (U. S.)*, 410, 426. See also *Oscanyan vs. Arms Co.*, 103 *U. S.*, 261, 266.

Hill vs. Callaghan, 31 *Mich.*, 424. The Common Law rule is, that if a contract or obligation under seal is void *ab initio*, the general plea of *non est factum* is proper. Where it is merely voidable, a special plea of the circumstances is necessary. *Bottomley vs. United States*, 1 *Story*, 135.

² *Sharon vs. Sharon*, 68 *Cal.*, 29.

Stannard vs. McCarty, 1 *Morr. (Iowa)*, 124; s. p., *Glidden vs. Higbee*, 31 *Iowa*, 379.

Kunz vs. Grund, 12 *Kans.*, 547.

Granger vs. Ilsley, 2 *Gray (Mass.)*, 521.

Hulet vs. Stratton, 5 *Cush. (Mass.)*, 539.

Boswell vs. Welshoefer, 9 *Daly (N. Y.)*, 196; *May vs. Burras*, 13 *Abb. N. C. (N. Y.)*, 384. See also *Honegger vs. Wettstein*, 94 *N. Y.*, 252; s. c., 13 *Abb. N. C.*, 393; *Schreyer vs. Mayor*, etc., of N. Y., 39 *N. Y. Super. Ct. (J. & S.)*, 1; *Gilbert vs. Sage*, 5 *Lans. (N. Y.)*, 287.

“That rule has been applied in numerous cases where the alleged illegality consisted in the violation of a statute. Defence of usury (*Mechanics’ Bank of Williamsburg vs. Foster*, 44 *Barb. (N. Y.)*, 87; s. c., 19 *Abb. Pr. (N. Y.)*, 47; 29 *How. Pr. (N. Y.)*, 408; wager policy (*Valton vs. National Fund Life Ass. Co.*, 20 *N. Y.*, 32; *Goodwin vs. Mass. M. Life Ins. Co.*, 73 *N. Y.*, 480, 496); violation of statute requiring that the designation “& Co.” shall represent an actual partner (*O’Toole vs. Garvin*, 1 *Hun (N. Y.)*, 92; s. c., 3 *N. Y. Supm. Ct. (T. & C.)*, 118); gaming contract (*May vs. Burras*, 13 *Abb. N. C. (N. Y.)*, 384); violation of revenue law. (*Honegger vs. Wettstein*, 94 *N. Y.*, 252; s. c., 13 *Abb. N. C.* 393.)” Per JAMES, C. SMITH, P. J., in *Hopkins vs. Ensign*, 11 *N. Y. State Rep.*, 85.

[*Contra*, as to judgment, *Kinsey vs. Ford*, 38 *Barb.* (N. Y.), 195.

* See § 669.

* See *Milbank vs. Jones*, 25 *N. Y. State Rep.*, 868; s. c., 5 *N. Y. Supp.* 914, and *cas. cit.*

In applying the rule that it must be pleaded, some aid may be had by inquiring specifically what has the complaint alleged. If, for instance, the allegation of the complaint in form is only defendant "conveyed" specified premises, and a deed is put in evidence, a denial may well be held to admit extrinsic evidence of facts avoiding the deed, because they show that plaintiff's allegation that he conveyed is untrue. If the allegation is that defendant executed and delivered the deed setting it forth, a denial may well be held to put in issue only the giving of the instrument, and facts impeaching it would not be admissible unless pleaded.

§ 913. *Variance as to nature of illegality.*—A defence that a contract is illegal for one reason, is not sustained by proof of another reason for the like illegality.

Rice vs. Enwright, 119 *Mass.*, 187. (Allegation by defendant sued for rent that plaintiff knowingly let the premises for unlawful sale of liquors, does not let in evidence that after a letting without such knowledge he permitted the premises to be so used.)

s. p., *Dingledein vs. Third Ave. R. R. Co.*, 9 *Bosw.*, 79. [Rev'd on other points in 37 *N. Y.*, 575.]

§ 914. *Illegality of counterclaim.*—Under the New Procedure, which tests counterclaims by the rules applicable to complaints, if defendant's answer, pleading a counterclaim arising out of the transaction sued on by plaintiff, shows that it was illegal, and that defendant's intent was illegal, defendant cannot recover on his counterclaim, even though plaintiff had no illegal intent.

Higgins vs. McCrea, 116 *U. S.*, 671, 685. (Here Woods, J., said: "The cross action . . . of the defendant, stated in his pleading and supported by his own deposition, was not one on which any recovery could be had. [Citing *Armstrong vs. Toler*, 11 *Wheat.* (U. S.), 258; *Brown vs. Tarkington*, 3 *Wall.* (U. S.), 377; *Davidson*

vs. Lanier, 4 *Wall. (U. S.)*, 447; *Hanauer vs. Doane*, 12 *Wall. (U. S.)*, 342.] The Court was bound to take judicial notice of the fact that the dealings recited in the counterclaim were forbidden by law, and of its own motion should have directed a verdict against the defendant thereon. [Citing *Oscanyan vs. Arms Company*, 103 *U. S.*, 261.]")

INDEBTEDNESS.

§ 915. "*Indebted*" a mere conclusion.—An allegation that a person is or was indebted, without stating facts showing indebtedness, is a mere conclusion, when made as the ground of establishing a liability or set-off, and is not enough to let in evidence against objection;¹ unless the defect has been waived or aided by taking issue.²

If the facts constituting liability are alleged, a denial of indebtedness without denying such facts is equally insufficient.³

¹ *California State Tel. Co. vs. Patterson*, 1 *Nev.*, 150.

Holgate vs. Broome, 8 *Minn.*, 243.

[In some jurisdictions the general allegation is still deemed sufficient where it would be at common law.]

² If plaintiff, instead of alleging facts constituting indebtedness, merely alleges that defendant became indebted by promising, etc., a general denial lets in evidence that there was no consideration for the promise; also that it was void by the statute of frauds, etc. *Weinhauer vs. Morrison*, 49 *Hun*, 498; s. c., 18 *N. Y. State Rep.*, 80.

³ *McKyring vs. Bull*, 16 *N. Y.*, 297.

INFANT.

§ 916. *General answer*.—The general answer on behalf of an infant, submitting its rights to the Court, does not let in evidence of a counterclaim.

Mullenbrick vs. Pooler, 4 *N. Y. State Rep.*, 127. (Holding it error to allow the recovery.)

INSANITY.

§ 917. An allegation that a person "was of unsound mind and wholly incapable of," etc., "and did not," etc., lets in evidence of mental incapacity and insane delusions.¹

An allegation that he was in feeble health and distress of mind, does not.²

¹ *Byrd vs. Nunn*, 25 *Weekly Rep. (Engl.)*, 749. And see *Wickwire's Appeal*, 30 *Conn.*, 86.

s. p., *Am. Bible Soc. vs. Price*, 115 *Ill.*, 623. ("Unsound mind and memory" lets in testator's insane delusions.) [For other cases see citations under § 274, *Demurrer to allegation of insanity.*]

² *Suffern vs. Smith*, 14 *N. Y. Weekly Dig.*, 412.

INTEREST.

§ 918. *Laches as barring interest.*—The fact that plaintiff has been guilty of laches in unreasonably delaying prosecution of the suit, after its commencement, may be proved, though not alleged, for the purpose of defeating his claim to interest on the demand sued for, during such delay.

Bartells vs. Redfield, 27 *Fed. Rep.*, 286, citing *Redfield vs. Ystalyfera Iron Co.*, 110 *U. S.*, 174. (Error to allow interest where there was a lapse of twenty-six years.)

JUDGMENT. [See also "DULY;" ESTOPPEL; FORMER RECOVERY; and JURISDICTION. For mode of pleading, see §§ 277, etc., *DEMURRER.*]

§ 919. *Denial.*—A denial of a judgment or other record does not let in evidence impeaching the validity of a record which existed as alleged.¹

Otherwise if the facts relied on as giving validity are

alleged in the complaint,—either at length or by the statutory short form,—and are denied.²

¹ *Hill vs. Mendenhall*, 21 *Wall.* (*U. S.*), 453. (Holding evidence to contradict jurisdictional recitals was inadmissible unless specially pleaded, and declaring the rule to be the same under the Code as at Common Law.)

Union Pacific Railway Co. vs. McCarty, 8 *Kan.*, 125.

Brown vs. Balde, 3 *Lans.* (*N. Y.*), 283.

[*Contra*, *Kinsey vs. Ford*, 38 *Barb.* (*N. Y.*), 195.

Carpenter vs. Goodwin, 4 *Daly*, (*N. Y.*), 89. (Holding that a *vacatur* for irregularity is no part of the judgment-roll, but merely matter in avoidance, and therefore must be pleaded.)

It is otherwise of a judgment or order not pleaded, but used only as evidence, to support an allegation as to title or right of possession. *Briggs vs. Bowen*, 60 *N. Y.*, 454. (Order of highway commissioners, offered to establish allegation that *locus in quo* was a public highway.)

It may be otherwise, also, of a judgment or order not bearing on its face sufficient evidence of, or ground for presuming, jurisdiction. For in such case reversal for want of jurisdiction would be competent, as tending to disprove plaintiff's necessary evidence to show jurisdiction.

² See JURISDICTION, §§ 920–3.

Trial by inspection. *Basset vs. United States*, 9 *Wall.* (*U. S.*), 38.

JURISDICTION. [See also JUDGMENT.]

§ 920. Statutory allegation as to former judgment, etc.

921. Want of jurisdiction of the subject.

§ 922. — In United States Courts.

923. — Evidence of lack of citizenship.

§ 920. *Statutory allegation as to former judgment, etc.*
—The statutory short form of alleging that a judgment or other determination, etc., was duly given or made lets in evidence of the jurisdictional facts whether the Court be one of the same or of a sister State.¹ If undenied, jurisdiction is admitted.²

A denial of such allegation lets in evidence of want of jurisdiction.³

¹ See §§ 277–286, DEMURRER. As to the rule in those jurisdictions where there is no such statute, see §§ 255, 872.

² *Lazarus vs. Freidheim*, 51 *Ark.*, 371; s. c., 11 *South West. Rep.*, 518.

Robertson vs. Perkins, 129 *U. S.*, 233; s. c., 32 *Law. ed.*, 686; 9 *Supm. Ct.*, 279.

³ *Roys vs. Lull*, 9 *Wisc.*, 324.

§ 921. *Want of jurisdiction of the subject.*—If jurisdiction of the subject of the action appears from the allegations of the complaint, or may be presumed, a defendant who has not pleaded the want of jurisdiction cannot introduce evidence for the purpose of showing that the Court has not the jurisdiction so alleged or presumed.¹

¹ *Bradt vs. Kirkpatrick*, 7 *Paige (N. Y.)*, 62. (Value of matter in controversy.)

s. p., *Church vs. Ide*, *Clarke (N. Y.)*, 494.

² But evidence otherwise properly received will support the objection. *Robinson vs. Oceanic Steam Nav. Co.*, 112 *N. Y.*, 315.

§ 922. — *In United States Courts.*—In the United States Courts, if the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated, plaintiff may give evidence at the trial for the purpose of showing that the value of the subject-matter exceeds the sum fixed as the minimum limit of jurisdiction, although the pleading contain no allegations to that effect.

Beard vs. Federy, 3 *Wall. (U. S.)*, 478; s. c., 18 *Law. ed.*, 88. (Ejectment. Judgment affirmed on appeal where the evidence showed a sufficient value, although all allegations as to value had been stricken out at the trial.)

Crawford vs. Burnham, 4 *Am. L. J. Rep. (U. S.)*, 228. (Ejectment. *Held*, that it is the practice to receive evidence offered at the trial under the general issue, to show

the value within jurisdictional limit. The evidence here being insufficient, the suit was dismissed.)

Exp. Bradstreet, 7 *Pet. (U. S.)*, 634. (United States Practice Act 1889, requiring the Circuit Court to dismiss or remand if it shall appear at any time that it has not jurisdiction of the suit.)

[*A fortiori*, in a Court of general jurisdiction the lack of the allegation could be no ground for excluding the evidence.]

§ 923. — *Evidence of lack of citizenship*.—If, in a cause in the Federal Court dependent on citizenship for jurisdiction, the pleadings do not raise the issue of citizenship, evidence to disprove it is not admissible as matter of right.¹

¹ *Draper vs. Springport*, 15 *Fed. Rep.*, 328; s. c., 15 *Reporter*, 677.

But under the statute the Court may give opportunity to try the question. *Rae vs. Grand Trunk Ry. Co.*, 14 *Fed. Rep.*, 401.

Imperial Refining Co. vs. Wyman, 38 *id.*, 574.

[*Compare Sharon vs. Hill*, 26 *Fed. Rep.*, 722; s. c., 10 *Sawy.*, 666. (Holding a decision against the objection when raised by plea in abatement, conclusive on the trial of the merits.)]

LEAVE TO SUE.

§ 924. *Omission to obtain or allege*.—It is the better opinion that where a statute forbids actions of a specified class to be brought without leave of Court or other such preliminary, plaintiff is not entitled to prove leave obtained, unless it has been alleged.¹ And that where the requirement rests in the practice of the Court, the objection is waived if not raised by special motion before the trial or by the answer.²

The cases are conflicting. They do not explain the distinction; but I believe that this distinction usually governs in practice, and explains most of the apparent conflict between well-considered cases. See:

Scofield vs. Doscher, 72 *N. Y.*, 491, aff'g 10 *Hun*, 582; *McKernan vs. Robinson*, 84 *N. Y.*, 105; s. c., 11 *Weekly Dig.*, 47, aff'g 23 *Hun*, 289; *Krower vs. Reynolds*, 19 *N. Y. Weekly Dig.*, 383 (rev'd on another ground in 99 *N. Y.*, 245); *Brush vs. Hoar*, 14 *Civ. Pro. R.*, 297; s. c., 15 *N. Y. State Rep.*, 859; *N. Y. Ass. of Game, etc., vs. Durham*, 51 *N. Y. Super. Ct. (J. & S.)*, 306; *Hauselt vs. Fine*, 18 *Abb. N. C. (N. Y.)*, 142; *Elkhart Car Works Co. vs. Ellis*, 113 *Ind.*, 215; *Crook Co. vs. Bushnell*, 15 *Oreg.*, 169; s.c., 13 *Pacif. Rep.*, 886; *Waterman vs. Dockray*, 78 *Me.*, 139; *Leuthold vs. Young*, 32 *Minn.*, 122; *Town of Roxbury vs. Central V. R. Co.*, 60 *Vt.*, 121; s. c., 14 *Atl. Rep.*, 92; *Barton vs. Barbour*, 104 *U. S.*, 126.

LIMITATIONS.

§ 925. *Form of necessary objection.*—Under a provision in the Statute of Limitations to the effect that the objection that the action was not commenced within the time limited can be taken only by answer,¹ a general allegation that the action is barred by the Statute of Limitations is not sufficient.²

¹ *N. Y. Code Civ. Pro.*, § 413.

Limitations not available as a defence unless specially pleaded as a defence. *Gormley vs. Bunyan*, 138 *U. S.*, 623, 635. (Illinois and New York).

The provision to the above effect, introduced by the catchword "How objection taken under this chapter," is in the chapter of the Code entitled "Limitation of the time of enforcing a civil remedy." There are a number of other limitations peculiar to particular classes of actions not specified in this chapter, such, for instance, as the two years' limitation of an action for divorce for physical incapacities (§ 1752); the two years' limitation of an action for negligence, etc., causing death (§ 1903); and the ten years' limitation on actions by the people under the "peculation act," so called (§ 1973). The provision of the Statute of Limitations forbidding the benefit of the statute unless the objection is taken by answer, is held to apply to such special limitations, though not contained in the Statute of Limitations. See *Bihin vs. Bihin*, 17 *Abb. Pr. (N. Y.)*, 19; *Kaiser vs. Kaiser*, 16 *Hun (N. Y.)*, 602. (Divorce. Otherwise of a special limitation in an act of Congress.

Natl. State Bank of Newark *vs.* Boylan, 2 *Abb. N. C.*, 216. (Arising under the United States statute limiting the time for recovering back usury received by National Bank.) As to extending exemptions from the statute by reason of absence, to special limitations not mentioning such exemptions,—see *Londrigan vs. N. Y. & New Haven R. R. Co.*, 12 *Abb. N. C.* 273 (Foreign corporation.)

* *Budd vs. Walker*, 29 *Hun (N. Y.)*, 344; s. c., 3 *N. Y. Civ. Pro. R.*, 422. (Allegation that the claims are stale and outlawed, claiming the benefit of all statutes, etc., insufficient.)

To same effect, *Paine vs. Comstock*, 57 *Wis.*, 159, and cases cited.

The proper form is, that the cause of action did not accrue at any time within the statutory period [specifying it] next before the commencement of this action. *Bell vs. Yates*, 33 *Barb. (N. Y.)*, 627.

MISNOMER.

§ 926. Misnomer of a party on the record.

§ 927. Oral evidence of mistake in writing.

928. Amending.

§ 926. *Misnomer of a party on the record.* If no question is made as to whether the person appearing at the trial is the one seeking to recover identity of the as plaintiff or against whom recovery is sought as defendant, a misnomer of him considered merely as an objection that he is not properly named upon the record so as to show correctly who is before the Court, is waived unless pleaded; and therefore if not pleaded, cannot avail as a defence at the trial.¹

This rule applies to corporations,² and to private persons suing in a supposed corporate name,³ as well as to individual parties.

At Common Law,⁴ and perhaps in the United States Courts, even those sitting in Code States,⁵ a plea to raise this objection must be a plea in abatement, and the objection will therefore be waived by a plea in bar.

Under the New Procedure, the objection may, like any other defence, be pleaded, in an answer together with other defences.⁶

¹ *Traver vs. Eighth Av. R. R. Co.*, 4 *Abb. Ct. App. Dec.* (N. Y.), 422; s. c., 6 *Abb. Pr.*, (N. S., N. Y.), 46; 3 *Keyes* (N. Y.), 497; *Heards' Civ. Pl.*, 221. (Under Code.)

Doherty vs. Madgett, 58 *Vt.*, 323; s. c., 2 *Atl. Rep.*, 115; s. c., 3 *East. Rep.* 459 (Common Law.)

Hoffield vs. Board of Education of the City of Newton, 33 *Kans.*, 644; s. c., 7 *Pac. Rep.*, 216.

Compare McGaughey vs. Woods, 106 *Ind.*, 380; s. c., 7 *North East. Rep.*, 7. (Holding that the objection that there was no such person as the one named as plaintiff was waived by default.)

² *Hoffield vs. Board of Education of the City of Newton* (above cited).

Barnes vs. Perine, 9 *Barb.* (N. Y.), 202, aff'd in 12 *N. Y.*, 18.

An answer objecting that defendant is misnamed must state his true name. *White vs. Miller*, 7 *Hun* (N. Y.), 427, 433 [reversed on another point in 71 *N. Y.*, 118]; *Louisville, etc., R. R. Co. vs. Hall*, 12 *Bush.* (Ky.), 131.

³ *Bank of Havana vs. Magee*, 20 *N. Y.*, 355, aff'g 7 *Abb. Pr.* (N. Y.), 134; 16 *How. Pr.* (N. Y.), 97.

⁴ *Mann vs. Carley*, 4 *Cow.* (N. Y.), 148.

First National Bank vs. Jagers, 31 *Md.*, 38.

Louisville, etc., R. R. Co. vs. Hall, 12 *Bush* (Ky.), 131.

Pennsylvania Co. vs. Sloan, 125 *Ill.*, 72; s. c., 14 *West. Rep.*, 379, 381; 17 *North East. Rep.*, 37.

s. p., Hudson vs. Poindexter, 42 *Miss.*, 304. (Demurrer overruled because objection should be taken by plea in abatement.)

⁵ *Cuthbert vs. Galloway*, 35 *Fed. Rep.* 466.

⁶ *Traver vs. Eighth Ave. R. R. Co.* (above cited).

§ 927. *Oral evidence of mistake in writing.*—Where a contract is alleged in which defendant has been designated by a wrong name, oral evidence is admissible to show the mistake for the purpose of holding him liable.

Cleveland vs. Burnham, 64 *Wis.*, 347; s. c., 25 *North West. Rep.*, 407.

§ 928. — *Amending*.—Where an objection to misnomer amounts only to an objection that there is a variance between the allegation and the proof, the allegation is amendable at the trial if the party objecting has not been misled.¹

Where a misnomer raises the objection that the proper party, plaintiff or defendant, is not correctly named on the record, it is equally curable by amendment at the trial, if the party is actually before the Court, and the objector has not been misled.²

Otherwise if the error involves the identity of the party on the record, as for instance where the proper party was not served and has not appeared.

¹ *McCrory vs. Anderson*, 103 *Ind.*, 12; s. c., 2 *North East. Rep.*, 211.

² And see *Riley vs. Stern*, 23 *Abb. N. C. (N. Y.)*, 435; *Anderson vs. Horn*, *id.*, 475.

The objection that the name of the plaintiff is erroneous, or that there was no such person, does not, in the absence of fraud or collusion, render a judgment suffered by default, void or impeachable collaterally; for the failure to object before judgment, waives the error. *McGaughey vs. Woods*, 106 *Ind.*, 380; s. c., 7 *North East. Rep.*, 7. (In this case a fresh action to vacate the judgment was treated as a collateral proceeding; but in New York and some other jurisdictions, such an action equally as a motion in the original action is regarded as a direct attack.)

Hathaway vs. Sabin, 61 *Vt.*, 608; s. c., 18 *Atl. Rep.*, 188. ("Doing business under the name of," added at the trial.)

Traver vs. Eighth Ave. R. R. Co., 4 *Abb. Ct. App. Dec. (N. Y.)*, 422; s. c., 3 *Keyes*, 497. (Married woman designated by maiden name.)

Bank of Havana vs. Magee, 20 *N. Y.* 355, *aff'g* 7 *Abb. (N. Y.)*, 134; 16 *How. Pr. (N. Y.)*, 97. (Bank wrongly named.)

Wolcott vs. Meech, 22 *Barb. (N. Y.)*, 321. (Omission of first given name immaterial.)

Pape vs. Capital Bank, 20 *Kans.*, 440. (Suing as "The Capital Bank of Topeka," instead of "The Capital

Bank," the bank being located in Topeka,—disregarded as immaterial.)

MISTAKE. [See also MISNOMER.]

§ 929. Necessary allegation.

930. — alternative.

931. Demand of reformation.

§ 932. Mistake as an avoidance though not pleaded.

§ 929.—*Necessary allegation*.—Where mistake in a written instrument is to be pleaded, the actual intent and the erroneous clause must both be stated in order to let in evidence.¹ But a formal allegation of mistake, by the use of that word, is not essential.²

¹ *Coles vs. Bowne*, 10 *Paige* (N. Y.), 526.

Wemple vs. Stewart, 22 *Barb.* (N. Y.), 154.

s. p., *Sherwood vs. Sherwood*, 45 *Wisc.*, 357. (Holding it not enough to allege that the mistake—a misdescription in a will—was apparent on the face of the instrument, for this was a mere conclusion.)

² *Maher vs. The Hibernia Ins. Co.*, 67 *N. Y.*, 283, aff'g 6 *Hun* (N. Y.), 353. (Action on insurance policy, asking reformation for mistake as incidental to recovery.)

§ 930. — *alternative*.—An alternative allegation that the statement in the instrument of a matter was erroneously inserted, either purposely or inadvertently, and that it was not in fact true, is sufficient to let in evidence of either cause of error.

Brake vs. Sparks, 117 *Ind.*, 89; s. c., 19 *North East Rep.*, 719. And see *Kneer vs. Bradley*, 105 *Pa. St.*, 190.

s. p., § 596, and cases in note in 24 *Abb. N. C.* (N. Y.), 326, on pleading alternative grounds of recovery.

§ 931. *Demand of reformation*.—An allegation of mistake in the instrument embodying an agreement admitted to have been made, (as distinguished from an allegation of mistake between the contracting parties in

reference to the terms or subjects of the transaction), will not let in evidence necessary to reform the instrument unless the mistake, or facts constituting it, be alleged and reformation asked as affirmative relief.

Coles vs. Bowne, 10 *Paige*, (N. Y.), 526.

King vs. Enterprise Ins. Co., 45 *Ind.*, 43, 58.

s. P., *Born vs. Schrenkheisen*, 110 *N. Y.*, 55. (But holding the objection unavailable on appeal, because not taken at the trial.)

§ 932. *Mistake as an avoidance, though not pleaded.*—

Where defendant relies on an assignment, release or other such matter arising subsequent to the accrual of the cause of action, as a defence, plaintiff may prove that the instrument relied on was given under mistake, although he has not pleaded such mistake ; for his action is not founded upon the instrument, and he is not bound to anticipate such a defence.

Meyer vs. Lathrop, 73 *N. Y.*, 315, aff'g 10 *Hun* (N. Y.) 66., (Foreclosure ; defendant relying on receipt in full and agreement to assign at defendant's request.)

NEGLECT. [See also DAMAGES ; NUISANCE ; and TORT.]

§ 933. General allegation.

934. Non-compliance with customary precaution.

935. Denial of defendant's negligence.

§ 936. "Gross" and "wilful" negligence.

937. — denial.

§ 932. *General allegation.*—A general allegation of negligence lets in evidence of the circumstances constituting it,¹ even though besides the general allegation there is an allegation of other circumstances which are unproved.²

But where plaintiff alleges only specified circumstances as constituting the negligence causing the injury, his proof will be confined to such allegation.³

¹ *Oldfield vs. N. Y. & Harlem R. R. Co.*, 14 *N. Y.*, 310. (Running over a child. Under general averment, evidence that there were no suitable brakes or guards in front of the car is admissible.)

Davis vs. Guarnieri, 45 *Ohio St.*, 470. (Action for causing death of plaintiff's wife by negligence in selling a poisonous drug. *Held*, the omission of the statutory label of "poisonous" was a circumstance that might be shown without allegation.)

Dougherty vs. Missouri R. Co., 97 *Mo.*, 647; s. c., 15 *West. Rep.*, 235; s. c., 8 *South West Rep.*, 900. (An allegation of negligence in operating a street car, lets in evidence of the disposition of the horses.)

s. p., *Coudy vs. St. Louis, I. M. & S. R. Co.*, 85 *Mo.*, 79.

² *Edgerton vs. N. Y. & Harlem R. R. Co.*, 39 *N. Y.*, 227, aff'g 35 *Barb. (N. Y.)*, 193.

Cunningham vs. Union Pacific R. Co., 4 *Utah*, 206; s. c., 7 *Pac. Rep.*, 799.

Abb. Tr. Ev., 583.

² In 20 *Abb. N. C. N. Y.*, 236, will be found a note on Allegation and Proof of Negligence.

§ 934. *Non-compliance with customary precautions.*—

A general allegation of negligence in the doing of an act lets in evidence of the customary precautions to prevent injury, and that defendant omitted them.

Beard vs. Illinois Central R. Co., 79 *Iowa*, 518; s. c., 7 *Law. R. Anno.*, 280. (Custom of carriers to put perishable goods in cold storage during delay.)

Henry vs. Sioux City & P. R. Co., 66 *Iowa*, 52; s. c., 30 *North West. Rep.*, 630. (Injury to servant; evidence of company's rules, and their non-observance.)

§ 935. *Denial of defendant's negligence.*—A denial of an allegation that defendant's negligence caused the injury sued for, lets in evidence of defendant's acts of caution and prudence.¹ Also, that a third person's negligence or wilful act may have caused the injury.² Also, that plaintiff's contributory negligence may have caused it.³

But it does not let in plaintiff's agreement to take the risk.⁴

- ¹ *Stevens vs. Lafayette, etc., R. Co.*, 99 *Ind.*, 392. (Allegation of negligent construction of fence, obstructing stream, and destroying plaintiff's bridge. Denial lets in evidence that it was constructed in the best manner to avoid injury to the bridge.)
- Kendig vs. Overhulser*, 58 *Iowa*, 195. (Defendant may show affirmatively what prudence and caution he employed.)
- ² *Ireland vs. Cincinnati, W. & M. R. Co.*, 79 *Mich.*, 163; s. c., 44 *North West. Rep.*, 426.
- Hoffman vs. Gordon*, 15 *Ohio St.*, 211. (Special allegation is not new matter, but only a denial.)
- s. p., *Andrews vs. Miles*, 15 *N. Y. Weekly Dig.*, 290. (Ownership of cattle escaping through fence.)
- ³ *McDonnell vs. Buffum*, 31 *How. Pr. (N. Y.)*, 154.
- s. p., *Lee vs. Troy Citizens' Gas Light Co.*, 98 *N. Y.*, 115; s. c., 20 *N. Y. Weekly Dig.*, 413. (Holding that it is not necessary for the complaint to set out the absence of contributory negligence, since the fact was involved in the allegation that the injury was occasioned by defendant's negligence. Citing *Hackford vs. N. Y. C. R. R. Co.*, 6 *Lans. (N. Y.)*, 381; s. c., 13 *Abb. Pr. N. S.*, 18; 43 *How. Pr.*, 222.
- Fernbach vs. City of Waterloo*, 76 *Iowa*, 598; s. c., 34 *North West. Rep.*, 610.
- To same effect, *McQuade vs. Chicago & N. W. R. Co.*, 68 *Wisc.*, 616. (So holding, especially where the complaint alleges that it occurred without fault of plaintiff.)
- [*Contra*, *Schlereth vs. Missouri Pac. R. Co.*, 96 *Mo.*, 509; s. c., 10 *South West. Rep.*, 66. (Where the only defence is a general denial, contributory negligence is no defence, unless shown by plaintiff's evidence.) *Donovan vs. Hannibal & St. Joseph R. R. Co.*, 89 *Mo.*, 147; s. c., 5 *West. Rep.*, 396.]
- ⁴ *Citizens' Street R. Co. vs. Twiname*, 111 *Ind.*, 587; s. c., 13 *North East. Rep.*, 55; 10 *West. Rep.*, 824.

§ 936. "Gross" and "wilful" negligence.—An allegation of gross and wilful negligence,¹ or gross negligence and recklessness,² will not let in evidence of such wilful injury as must be shown to render defendant liable irrespective of contributory negligence or of being a trespasser.

But under such allegations, unintentional negligence may be shown, if the allegations of the complaint would otherwise sustain a recovery on such ground.³

¹ *Belt Railroad & Stock Yard Co. vs. Mann*, 107 *Ind.*, 89; s. c., 5 *West. Rep.*, 314.

² *Chicago & Eastern Illinois R. R. Co vs. Hedges*, 105 *Ind.*, 398; s. c., 3 *West. Rep.*, 892.

§ 937. — *denial*.—Under a denial of an allegation that the act was wrongful, unlawful, and negligent, defendant is entitled to prove the lawfulness of the work in which he was engaged, so that his liability may be determined on a question of negligence.

Cunningham vs. Wright, 28 *Hun (N. Y.)*, 178.

NUISANCE. [See also DAMAGES; NEGLIGENCE; and TORT.]

§ 938. *Variance*.—A complaint stating facts constituting a nuisance, as the cause of action, does not let in evidence of mere negligence resulting in the injury complained of;¹ nor does it let in without amendment evidence of facts substantially different from those alleged, although producing substantially the same annoyance and injury as alleged.²

¹ See note on distinction between Negligence and Nuisance as causes of action in 25 *Abb. N. C. (N. Y.)*, 195.

² *Kosmak vs. Mayor, etc., of N. Y.*, 53 *Hun (N. Y.)*, 329; s. c., 6 *N. Y. Supp.*, 453; 24 *N. Y. State Rep.*, 798. (Allegation of discharge of refuse from a public sewer does not let in proof of a private sewer from premises of which the city was owner.)

s. p., *O'Brien vs. City of St. Paul*, 18 *Minn.*, 176.

Hill vs. Supervisor of Road Dist. No. 6, 10 *Ohio St.*, 621. (Allegation of obstructing road by building fence across it, does not without amendment let in evidence of obstruction by overflow of water caused by building fence by the side of it.)

OFFER.

§ 939. *Omission of offer to do equity.*—The fact that there is no offer in the bill or complaint to do equity as a condition of the relief asked,—as for instance in an action to cancel a usurious security,—is not available at the trial if not taken by demurrer.

Schermerhorn vs. Talman, 14 *N. Y.*, 93, 129. (Conceding the rule to be otherwise on demurrer.)

Followed in *Beecher vs. Ackerman*, 1 *Robt. (N. Y.)*, 30 ; s. c., 1 *Abb. Pr., N. S.*, 141 ; s. p., 51 *N. Y.*, 670.

As to necessity of an offer of return or surrender, in order to the rescission of a contract for fraud, etc., see note in 14 *Abb. N. C. (N. Y.)*, 301.

ORDINANCES. [See also BY-LAWS.]

§ 940. *Must be pleaded.*—Evidence of an ordinance of a municipal corporation is not admissible to establish a cause of action¹ or a defence² founded on it, unless it has been specially pleaded.

[Its admission in an action for negligence independent of the ordinance is another question.]

¹ *Blanchard vs. Lake Shore & M. S. R. Co.*, 126 *Ill.*, 416.

[In *Whittaker vs. N. Y. & Harlem R. R. Co.*, 51 *N. Y. Super. Ct.*, 287, an ordinance was admitted to show negligence, although it seems not to have been pleaded, but the Court does not notice the point. See also to same effect *Reich vs. Mayor, etc.*, of N. Y., 12 *Daly (N. Y.)*, 72 (to show a nuisance); *Cumming vs. Brooklyn City R. Co.*, 38 *Hun (N. Y.)*, 362. s. p., *Archer vs. N. Y., New Haven, etc., R. Co.*, 106 *N. Y.*, 589, admitting a foreign statute not pleaded in order to show negligence of defendant, a railway, which was admittedly a corporation of the State whose statute was introduced.]

² *Mooney vs. Kennett*, 19 *Mo.*, 551. (Justification.)

OWNERSHIP. [See also ASSIGNMENT ; BONA-FIDE PURCHASER ; and TITLE.]

§ 941. General allegation.

§ 942. Denial.

§ 941. *General allegation*.—A general allegation of ownership lets in evidence of any interest in the property which will support the cause of action or defence.¹ For this purpose an allegation describing articles as goods and chattels of the plaintiff is enough.²

¹ *Phoenix Ins. Co. vs. Rowe*, 117 *Ind.*, 202 ; s. c., 20 *North East. Rep.*, 122. (Insurable interest.)

Loeb vs. Chur, 6 *N. Y. Supp.*, 296 ; s. c., 25 *State Rep.*, 996. (Answer of absolute ownership let in proof of holding as collateral.)

Gorum vs. Carey, 1 *Abb. Pr. (N. Y.)*, 285. (Allegation of ownership let in evidence of holding as factor.)

s. p., *Carter vs. Bowe*, 41 *Hun (N. Y.)*, 516. (Sheriffs' answer that the goods belonged to the execution debtor, let in evidence that the debtor's transfer to plaintiff was a fraud on creditors.)

² *Tell vs. Beyer*, 38 *N. Y.*, 161. (Holding under such a description that ownership was admitted if not denied.) s. p. on, demurrer, *Childs vs. Hart*, 7 *Barb. (N. Y.)*, 370.

§ 942. *Denial*.—Where the allegation of ownership is general without stating facts showing it, a denial lets in any evidence to disprove plaintiff's ownership, including evidence of fraud,¹ or ownership of defendant² or a third person.³

Where the allegation consists of a statement of the facts upon which ownership depends, a general denial only denies those facts, and does not let in evidence to disprove ownership otherwise than by controverting the facts alleged.⁴ And a mere denial of ownership without denying the facts will not let in evidence to disprove such facts.⁵

- ¹ *Eureka I. & S. Works vs. Bresnahan*, 66 *Mich.*, 489; s. c., 10 *West Rep.*, 194; s. c., 33 *North West Rep.*, 834.
s. p., *Stern Auction & Commission Co. vs. Mason*, 16 *Mo. App.*, 473; *Young vs. Glascock*, 79 *Mo.*, 574.
Merrill vs. Wedgwood, 25 *Nebr.*, 283; s. c., 41 *North West Rep.*, 149.
Wager vs. Ide, 14 *Barb. (N. Y.)*, 468; *Avery vs. Mead*, 12 *N. Y. State Rep.*, 749; s. c., 46 *Hun*, 682.
s. p., *Bailey vs. Swain*, 45 *Ohio St.*, 657.
Mather vs. Hutchinson, 25 *Wis.*, 27.
² *Whitcher vs. Shattuck*, 85 *Mass. (3 Allen)*, 319. (Replevin.)
Foye vs. Patch, 132 *Mass.*, 105.
Staubach vs. Rexford, 2 *Mont.*, 565.
Schoenrock vs. Farley, 49 *N. Y. Super. Ct. (J. & S.)*, 302.
[If a wrongful taking will sustain plaintiff's cause of action for conversion of personal property, defendant cannot justify such taking by showing ownership in himself, although plaintiff has alleged ownership. *Klinger vs. Bondy*, 36 *Hun (N. Y.)*, 601; s. c., 21 *N. Y. Weekly Dig.*, 483; s. p., *Emerson vs. Thompson*, 59 *Wis.*, 619. See also DETENTION.]
³ *Schulenberg vs. Harriman*, 21 *Wall.*, 44, 59. (Replevin. A denial of plaintiff's allegation of property and right of possession lets in evidence of title in another.)
s. p., *Driscoll vs. Dunwoody*, 7 *Mont.*, 394; s. c., 16 *Pacific Rep.*, 726.
Woodsum vs. Cole, 69 *Cal.*, 142; s. c., 10 *Pacific Rep.*, 331. (Action by indorsee of promissory note. Defendant may show that plaintiff paid no money for the note, and was not the legal owner.)
⁴ *Johnson vs. Oswald*, 38 *Minn.*, 550.
⁵ *Hawes vs. Ryder*, 100 *Mass.*, 216. (Indorsement of note.)
Holbrook vs. Sims, 39 *Minn.*, 122; s. c., as *Holbrook vs. Usher*, 39 *North West Rep.*, 74, 140.
s. p., *Poorman vs. Mills*, 35 *Cal.*, 118.

PARTNERSHIP.

§ 943. Defect of parties.

944. Joint act, or firmact.

945. Separate individual act.

§ 946. Abortive special partnership.

947. False representation of being partners.

§ 943. *Defect of parties*.—A mere denial of an allegation of partnership, does not let in evidence that there are other members of the firm who should have been made parties.

Karelsen vs. Sun Fire Office, 45 *Hun* 144 ; s. c., 9 *N. Y. State Rep.*, 831. (Holding that the fact should have been pleaded, and that they were still living, etc.)

§ 944. *Joint act or firm act.*—In a legal action on contract, an allegation of a partnership and the making of the contract by or to the firm, lets in evidence of a joint contract or obligation made by or to the same persons, though the partnership be not proven.¹

An allegation of a joint contract lets in evidence that the joint contractors were co-partners, and contracted as such.²

¹ *Millard vs. Thorne*, 56 *N. Y.*, 402 ; s. c., 15 *Abb. Pr. (N. S.)*, 371. (Partnership of defendants not material.)

s. p., *Lee vs. Orr*, 70 *Cal.*, 398. (Partnership of plaintiffs suing on a judgment recovered by them jointly not material.)

Geddes vs. Adams, 77 *Mass. (11 Gray)*, 384. (Denial of allegation that firm accepted a bill, does not require proof of partnership in addition to proof of acceptance.)

² *Loper vs. Welch*, 3 *Duer (N. Y.)*, 644.

§ 945. *Separate individual act.*—An allegation of a partnership contract does not let in evidence of an individual contract by one of the alleged members, made independently of the firm.

McLewee vs. Hall, 103 *N. Y.*, 639

§ 946. *Abortive special partnership.*—An allegation of partnership is supported by evidence of an abortive attempt to form a special partnership.

Vanhorn vs. Corcoran, 127 *Pa. St.*, 255.

Stone vs. De Puga, 4 *Sandf. (N. Y.)*, 681.

Abendroth vs. Van Dolsen, 131 *U. S.*, 66 ; s. c., 33 *L. ed.*, 57 ; s. c., 9 *Sup. Ct. Rep.*, 619.

Sharp vs. Hutchinson, 100 *N. Y.*, 533 ; s. c., 2 *N. Y. Weekly Dig.*, 368.

Bell vs. Merrifield, 109 *N. Y.*, 202.

[In some of these cases the admissibility of the evidence was put, in part at least, on the fact that the answer pleaded the special partnership as new matter, and that plaintiff can give without replication any evidence to controvert new matter.]

s. p., *Rosenbergh vs. Block*, 50 *N. Y. Super. Ct. (J. & S.)*, 357. (Action by alleged special partnership not allowed to fail by reason of ineffectual formation, because the interest of the plaintiffs was the same. But the judgment was reversed on the ground that the partnership was a sham, and fraudulent. 102 *N. Y.*, 255.)

§ 947. *False representation of being partners*.—An allegation of partnership between defendants in contracting lets in evidence of their holding themselves out as partners, and the obtaining of credit thereby in the contract in question.

But it is not competent to prove merely that the defendant sought to be charged by the pleading as a partner induced plaintiff to give credit to the other defendants, and so hold him liable with them on his individual promise.²

McLewee vs. Hall, 103 *N. Y.*, 639.

s. p., *Reber vs. Columbus Mach. Mfg Co.*, 12 *Ohio St.*, 175.

² *McLewee vs. Hall* (above cited).

PAYMENT.

§ 948. *Medium*.

949. Payment by third person.

950. Set-off, accord, etc.

§ 951. *Denial*.

952. Payment down or in advance.

953. Statutory presumption, or bar.

§ 948. *Medium*.—An allegation of the payment or delivery of money lets in evidence of payment or delivery in any medium which the parties to the transaction expressly treated as money;¹ but not other property not so treated,² unless where the party charged has by neglect

or conversion raised a presumption that he has received money.

¹ *Picard vs. Bankes*, 13 *East*, 20.

² See cases in *Abb. Tr. Ev.*, 263, and *Mann vs. Moorewood*, 5 *Sandf. (N. Y.)*, 557.

§ 949. *Payment by third person*.—An allegation of payment lets in evidence of payment by a third person.

Gray vs. Herman, 75 *Wisc.*, 453; s. c., 44 *North West. Rep.*, 248. (With *dictum* that payment by a stranger, accepted by plaintiff in satisfaction, would be enough.)
s. p., *Abb. Tr. Ev.* 800 (3), and cas. in n. 3.

§ 950. *Set-off, accord, etc.*—An allegation of payment or of set-off does not let in evidence of an accord and satisfaction.

An allegation of payment does not let in evidence of payment to a third person which might have been pleaded and proved as a set-off.²

¹ *Wheaton vs. Nelson*, 11 *Gray (Mass.)*, 15.

s. p., *Ulsch vs. Muller*, 143 *Mass.*, 379; s. c., 9 *Eastern Rep.*, 176.

s. p., *Grinnell vs. Spink*, 128 *Mass.*, 25.

Green vs. Storm, 3 *Sandf. Ch. (N. Y.)*, 305. (The Court say that a court of equity is restricted to the issues made by the pleadings; and, while it endeavors to avoid technical and narrow objections, cannot admit evidence of a different case from that pleaded.)

s. p., *Callen vs. Schuessler*, 86 *Ala.*, 527; s. c., 5 *Southern Rep.*, 795. (Holding evidence of paying off a claim of a third person which the vendor ought to have paid not to support an allegation of payment to the vendor.)

[Compare, for the peculiar rule in Pennsylvania, *Smaltz vs. Ryan*, 112 *Pa. St.*, 423; s. c., 3 *Atl. Rep.*, 772.]

² *Calkins vs. Packer*, 21 *Barb. (N. Y.)*, 275. (Payment to a judgment creditor of the creditor, made under the statute, held an offset, and not available under a general allegation of payment.)

§ 951. *Denial*.—Under the New Procedure, payment,

whether total or partial, of the indebtedness sued for¹ cannot be proved under a denial,² even though the complaint contain the usual formal but unnecessary allegation of non-payment, and this be specifically traversed.³

But if the complaint alleges that no part of the indebtedness shown has been paid except specified sums, and demands judgment for the balance, a general denial puts in issue the allegation that no other payments have been made, and lets in evidence of other payments than those admitted.⁴

¹ A payment only collaterally involved, and fatal to the title under which the adversary claims, may be proved under a general denial. *Benton vs. Hatch*, 43 *Hun* (N. Y.), 142. (Holding, in ejectment by one claiming under a sheriff's deed, that defendant under a general denial could prove that the judgment under which the sheriff sold had been previously paid. Judgment reversed for exclusion of this evidence.)

² *Morrell vs. Irving Fire Ins. Co.*, 33 *N. Y.*, 429.
McKyring vs. Bull, 16 *N. Y.*, 297.

³ *Edson vs. Dillaye*, 8 *How. Pr. (N. Y.)*, 273.

For a collection of authorities on the admissibility of evidence tending to prove payment under the general issue, and of a general denial having the same influence as the general issue in like circumstances, see 61 *Am. Dec.*, 59.

⁴ *Quin vs. Lloyd*, 41 *N. Y.*, 349, rev'g 1 *Sweeny* (N. Y.), 253. WOODRUFF, J., says: "Where plaintiff sues for a balance, he voluntarily invites examination into the amount of indebtedness, and the extent of the reduction thereof by payments, etc."

Brown vs. Forbes (*Dak.*, 1889), 43 *North West. Rep.*, 93. (Reversing judgment for error in excluding such evidence. SPENCER, J., says: "Where a plaintiff sues for a balance, alleging that certain payments, and no others, have been made, he empowers the defendant by his general denial to have the state of the account investigated, the extent to which the original demand has been reduced by payments ascertained, and the amount of the balance determined. Citing also *White vs. Smith*, 46 *N. Y.*, 418.)

[Otherwise if the complaint, after showing the amount of the gross indebtedness, only alleges that there is now

due a specified amount over and above all payments and offsets, without specifying any sums.]

§ 952. *Payment down or in advance.*—At Common Law a denial lets in evidence of payment down,¹ or payment in advance.²

Under the New Procedure, it is the better opinion that the same rule applies; for if the complaint alleges a contract or transaction apparently had on an executory consideration, a mere denial of the contract or transaction alleged lets in evidence of what the real contract or transaction was.³

¹ *Bussey vs. Barnett*, 9 *Mees. & W.*, 312.

Smith vs. Winter, 10 *Eng. L. & Eq.*, 506.

[*Contra*, doubts in *Littlechild vs. Banks*, 7 *Adol. & E. (N. S.)*, 739.

² *Starratt vs. Mullen*, 148 *Mass.*, 570; s. c., 2 *Law. R. Anno.*, 697; 20 *N. East. Rep.*, 178. (Here, in an action for goods sold and money lent, defendant under the general issue offered evidence.)

³ This follows from settled principles. Of course if the plaintiff's allegation is merely of indebtedness, and a denial of it is good, such evidence would be admissible.

§ 953. *Statutory presumption or bar.*—An allegation of payment does not avail to raise the objection that the claim is barred by the ordinary statutes of limitations.¹ Otherwise of a statute expressly declaring that lapse of time raises a presumption of payment.² And under such a statute it is the better opinion that allegations showing the staleness of the debt to exceed the statute period are sufficient.³

¹ *Lockhart vs. Fessenich*, 58 *Wis.*, 588.

² *Abb. Tr. Ev.*, 812 (25).

³ *Giles vs. Baremore*, 5 *Johns. Ch. (N. Y.)*, 545.

[*Pattison vs. Taylor*, 8 *Barb. (N. Y.)*, 250, so far as it holds the contrary, would compel a defendant who relied on the presumption only to swear (if the complaint were verified) to an allegation false in fact.]

REAL PARTY IN INTEREST. [See also AGENCY; AUTHORITY; CONTRACT; OWNERSHIP; TITLE.]

§ 954. *Facts must be pleaded.*—Under the New Procedure evidence to show that a sole plaintiff is not the real party in interest is inadmissible under a mere general denial, or allegation that he is not the real party in interest,¹ unless the case is such that plaintiff must prove ownership in order to establish his cause of action.²

If plaintiff alleges a cause of action accrued to himself, a denial, even though coupled with an allegation that he is not the real party in interest, does not let in evidence that he has been divested of his title by assignment.³

¹ *Smith vs. Hall*, 67 *N. Y.*, 48; *Jackson vs. Whedon*, 1 *E. D. Smith (N. Y.)*, 141.

s. p., *State ex rel. Ruhlman vs. Ruhlman*, 111 *Ind.*, 17; *s. c.*, 11 *North East. Rep.*, 793; 9 *West Rep.*, 275. (On demurrer.)

² See §§ 941, 942, *Ownership*.]

³ *Saunders vs. Chamberlain*, 13 *Hun (N. Y.)*, 568 *Kettletas vs. Maybee*, 1 *Code R., N. S. (N. Y.)*, 363.

TENDER. [See also CONTRACT; DEMAND.]

§ 955. *Necessity and effect of alleging.*—A tender cannot be proved unless pleaded.¹ But if no objection is made in the pleadings to an omission to allege payment into court, such payment may be made at the trial.²

Where tender is not part of the contract, but an act *in pais*, an allegation of tender lets in evidence of a waiver of tender.³

¹ *Sidenberg vs. Ely*, 90 *N. Y.*, 257, 266; *s. c.*, 11 *Abb. N. C.*, 354; 15 *N. Y. Weekly Dig.*, 400.

² *Halpin vs. Phenix Ins. Co.*, 118 *N. Y.*, 165; *s. c.*, 28 *N. Y. State Rep.*, 788; 23 *North East. Rep.*, 485.

³ *Woolner vs. Hill*, 93 *N. Y.*, 581.

TITLE. [See also OWNERSHIP.]

§ 956. General allegation.

957. Indirect allegation.

958. Denial in general language.

§ 959. Adverse possession.

960. Amending.

961. Failure to prove.

§ 956. *General allegation*.—A general allegation that a party is the owner in fee simple lets in evidence of the source and particulars of his title.

West vs. Cameron, 39 *Kans.*, 736; s. c., 19 *Pacif. Rep.*, 616. (Answer in ejectment.)

Monaghan vs. Agricultural F. Ins. Co., 53 *Mich.*, 238; s. c., 13 *Ins. L. J.*, 497. (Action on fire policy; allegation of title by will and evidence of title by deed. *Dictum*.)

Ostrander vs. Hart, 30 *N. Y. State Rep.*, 170; s. c., 8 *N. Y. Supp.*, 809. (*Dictum*, that it would be improper to plead the evidence of title.)

Cruiger vs. McLaury, 41 *N. Y.*, 219. (Ejectment: allegation of title by deed, evidence of title by inheritance;—*held*, an immaterial variance.)

Van Rensselaer vs. Jones, 2 *Barb. (N. Y.)*, 643. (Allegation of title to all; evidence of title to part admissible.)

Whether it lets in evidence of any lesser estate sufficient to maintain the action, compare the following cases.

[The better opinion is that this is usually to be treated as a question of surprise and prejudice.]

Lane vs. Schlemmer, 114 *Ind.*, 296; s. c., 15 *North East. Rep.*, 454, 12 *West. Rep.*, 922.

s. p., Richards vs. Smith, 98 *N. C.*, 509; s. c., 4 *South East. Rep.*, 625.

Vail vs. Long Island R. Co., 106 *N. Y.*, 283.

Bruce vs. Kelly, 39 *N. Y., Super. Ct. (J. & S.)*, 27; Smith vs. Portland, 30 *Fed. Rep.*, 734.

House vs. Howell, 6 *N. Y. Supp.*, 799; s. c., 25 *State Rep.*, 277.

Mays vs. Pryce, 95 *Mo.*, 603; s. c., 14 *West. Rep.*, 809.

St. Louis, etc., R. Co. vs. Whitaker, 68 *Tex.*, 630; s. c., 5 *South West. Rep.*, 448.

§ 957. *Indirect allegation*.—In personal actions and in trespass, plaintiff's title is matter of inducement; and describing the premises as "plaintiff's," or "his house,"

or "the house of the plaintiff," or in equivalent language, lets in evidence of his title.

1 *Chitt. Pl.*, 16 *Am. ed.*, 395.

Solomon *vs.* Grosbeck, 65 *Mich.*, 540; s. c., 9 *West. Rep.*, 105; s. c., 36 *North West. Rep.*, 163.

s. p., Fiske *vs.* Bailey, 51 *N. Y.*, 150; Quackenbos *vs.* Edgar, 61 *N. Y.*, 653, aff'g 34 *N. Y. Super. Ct. (J. & S.)*, 333.

§ 958. *Denial in general language.*—If the adverse party alleges title only by a general allegation of ownership, a denial thereof puts the title in issue and lets in evidence of any facts to controvert or impeach the title.¹

If the adverse party has alleged facts showing the derivation of his title, a denial in general language that he is owner, or an allegation that another person is owner in fee-simple, without denying the particulars alleged as source of title, is insufficient.²

¹ Terrell *vs.* Wheeler, 13 *N. Y. Civ. Pro. R.*, 178. (Ejectment.) Zolnowski *vs.* Shannon (*N. Y. Supm. Ct. Chamb.*, LAWRENCE, J.), *N. Y. Daily Reg.*, Dec. 18, 1889. (Action for specific performance: motion to make more definite and certain, denied.)

Sparrow *vs.* Rhoades, 76 *Cal.*, 208. (Denial of title lets in illegality in consideration of the deed under which plaintiff claims.)

Hastings *vs.* Hastings, 110 *Mass.* 280. (Trespass: denial lets in evidence that the parties are tenants in common.)

s. p., 1 *Chitt. Pl.*, 16 *Am. ed.*, 640.

Under the New Procedure it is the better opinion that even in an action of a legal nature in which the title to land may be determined,—as ejectment or trespass,—defendant may disprove plaintiff's title by showing a title of an equitable nature in himself, without specially pleading such title. Begg *vs.* Begg, 56 *Wisc.*, 534.

Wakefield *vs.* Day, 41 *Minn.*, 344.

s. p., Despard *vs.* Walbridge, 15 *N. Y.*, 374.

[*Contra*, Powers *vs.* Armstrong, 36 *Ohio St.*, 357.]

Kennedy *vs.* Daniels, 20 *Mo.*, 104.

² McCloskey *vs.* Barr, (*U. S. Ct., Ohio*), 38 *Fed. Rep.*, 165; s. c., 21 *Ohio L. J.*, 287.

Turner vs. White, 73 *Cal.*, 299.

[*Contra*, Morgan vs. Tillottson, 73 *Cal.*, 520; s. c., 15 *Pacif. Rep.*, 88.]

An allegation that under a deed (not set forth) the party did not acquire "the title to any real estate," is a mere conclusion of law. Flax Pond Water Co. vs. Lynn, 147 *Mass.*, 31; s. c., 3 *New Engl. Rep.*, 522.

§ 959. *Adverse possession*.—A general denial, or denial of title, lets in evidence of adverse possession such as to vest absolute legal right,¹ in the absence of any statute provision requiring the statute of limitations to be pleaded.²

¹ Campbell vs. Holt, 115 *U. S.*, 620; s. c., 29 *Law. ed.*, 483, and cas. cit.

3 *Harv. L. Rev.*, 321.

Hill vs. Bailey, 8 *Mo. App.*, 85.

s. p., Powers vs. Armstrong, 36 *Ohio St.*, 357.

² Hansee vs. Mead, 27 *Hun (N. Y.)*, 162; s. c., 2 *Civ. Pro. R. (Browne)*, 175; 14 *N. Y. Weekly Dig.*, 372.

s. p., Robinson vs. Allen, 37 *Iowa*, 27. [*Compare* Donahue vs. Thompson, 60 *Wisc.*, 500; s. c., 19 *North West. Rep.*, 520.]

§ 960. *Amending*.—A variance between the pleading and the proof in respect of the source or extent of the title or ownership, is amenable at the trial.

Avery vs. N. Y. Central, etc., R. R. Co., 106 *N. Y.*, 142.

Van Horne vs. Campbell, 101 *N. Y.*, 608, reaffirming 100

id., 287; s. c., 22 *Weekly Dig.*, 417, aff'g 3 *Hun (N. Y.)*, 218; s. c., 5 *N. Y. Supm. Ct. (T. & C.)*, 677.

McCammon vs. Detroit, etc., R. Co., 66 *Mich.*, 442; s. c., 33 *North West Rep.*, 728.

§ 961. *Failure to prove*.—When possession will support the action, an unnecessary allegation of title will not vitiate, but the failure to prove it may be disregarded.

Yeargain vs. Johnson, 1 *Taylor (N. C. Supr. Ct.)*, 80; s. c., 1 *Am. Dec.*, 581. (Action for overflowing plaintiff's land.)

TORT. [See also **DETENTION**; **ILLEGALITY**; **NEGLIGENCE**; **NUISANCE**.]

§ 962. Informal allegation of malice.

§ 964. Justification inadmissible under a denial.

963. Allegation of malice surplusage.

§ 962. *Informal allegation of malice.*—A complaint for damages for assault and battery, which does not allege in terms that the assault was made with malice, but does allege facts from which malice may be inferred,—viz., that the assault was made without any cause or provocation and with great force and violence,—is sufficient to admit proof of defendant's acts tending to establish the existence of malice.

Elfers vs. Woolley, 116 N. Y., 294.

§ 963. *Allegation of malice surplusage.*—In an action for tort, an allegation that a wrongful act was maliciously done lets in evidence of negligence also alleged,¹ unless the wrong is one in which malice is of the gist of the action.

McCord vs. High, 24 Iowa, 336.

s. p., *Panton vs. Holland*, 17 Johns. (N. Y.), 92.

[Compare § 936, *Negligence*; and cases in 25 Abb. N. C., on distinction, under the New Procedure, between pleading negligence, nuisance, and wrongful act.]

§ 964. *Justification inadmissible under a denial.*—Evidence of authority or excuse for the doing of an otherwise wrongful act constituting a tort at common law is inadmissible under a denial of such act.¹

But this rule does not preclude defendant from disproving any right or title which plaintiff has alleged and needs to prove.²

¹ *Omaha & G. Smelting & Refining Co. vs. Tabor*, 13 *Colo.*, 41; s. c., 2 *Denver Leg. News*, 281; 21 *Pac. Rep.*, 925. (A third person's right of possession; relied on in trespass.)

Warren vs. Carey, 145 *Mass.*, 78; 12 *North East. Rep.*, 999; 4 *New Engl. Rep.*, 867 (license to overflow land); *Ward vs. Bartlett*, 12 *Allen (Mass.)*, 419; *Mann vs. Tuck, id.*, 420; *Cooper vs. McKenna*, 124 *Mass.*, 284.

American Tool Co. vs. Smith, 1 *N. Y. State Rep.*, 761. (Tax warrant; judgment reversed for error in receiving it.)

Wehle vs. Butler, 12 *Abb. Pr., N. S.*, 139; s. c., 35 *N. Y. Super. Ct. (J. & S.)*, 1. (Action for the wrongful taking of goods, under attachment; evidence of subsequent retention and sale of the goods under process claimed to be valid, inadmissible.)

Pier vs. Finch, 29 *Barb. (N. Y.)*, 170. (Regulations of company justifying defendants, their servants, in ejecting plaintiff from train.)

Van Buskirk vs. Irving, 7 *Cow. (N. Y.)*, 35. (Trespass.)

Beaty vs. Swarthout, 32 *Barb. (N. Y.)*, 293. (Conversion.)

Mack vs. Kelsey, 61 *Vt.*, 399; s. c., 17 *Atl. Rep.*, 780. (Justification of assault by showing defendants were acting as prudential committee, and teacher of a school.)

Compare Keep vs. Quallman, 68 *Wis.*, 451. (Assault and battery. *Held*, error to exclude evidence of plaintiff's quarrelsome disposition, it appearing that he had accosted defendant in a threatening manner, and had previously threatened him.)

² See § 844, DETENTION, and § 942, OWNERSHIP.

So a denial of license does not let in evidence of an abandonment of the license. *Wilson vs. Stolley*, 4 *McLean (U. S. C. Ct.)*, 275.

In *Hoxsie vs. Empire Lumber Co.*, 41 *Minn.*, 548 (trespass for cutting logs), it is held that such authority may be proved under a denial, as bearing on the question of good faith, and consequently on the damages.

7. VARIANCE; AND AMENDING TO LET IN EVIDENCE OR CONFORM TO PROOF.

- | | |
|------------------------------------------------------------|--------------------------------------------------------|
| § 965. Variance a question for Court. | § 971. Amending as to defences. |
| 966. Immaterial variance disregarded or cured by amending. | 972. Amending as to capacity. |
| 967. Proof of surprise. | 973. Fact implied. |
| 968. Previous knowledge does not disprove surprise. | 974. Inherent power. |
| 969. Previous knowledge ground for refusing amendment. | 975. Not precluded by stipulation to try issue. |
| 970. Amending as to cause of action. | 976. Leave to amend does not supersede waiver of jury. |
| | 977. Bill of particulars. |
| | 978. Powers of United States Court. |

§ 965. *Variance a question for Court.*—The question whether there is a variance between an allegation and an offer of evidence under it is for the Court to determine, not for the jury.

Oxley *vs.* Storer, 54 *Ill.*, 159.

Riley *vs.* Dickens, 19 *Ill.*, 29. (Note on which the action was brought.)

S. P., Hendrick *vs.* Kellogg, 3 *Gr. (Ia.)*, 215.

Birch *vs.* Benton, 26 *Mo.*, 153. (Slanderous words.)

Prescott *vs.* Hayes, 43 *N. H.*, 593. (Objection to the admission of note because it varied from the note described in the mortgage.)

§ 966. *Immaterial variance disregarded or cured by amending.*—Under the New Procedure a variance between pleading and proof, which does not leave an essential allegation unproved in its entire scope and meaning, but only in one or more particulars, is not material unless the adverse party has been misled to his prejudice in maintaining his action or defence upon the merits; and may be disregarded or cured by immediate amendment.

¹ *N. Y. Code Civ. Pro.*, §§ 539, 540, 541. [The phrase “upon the merits” in the statute doubtless includes

the merits of a dilatory defence not going to "the merits of the action" in the ordinary sense.]

Thomas vs. Nelson, 69 *N. Y.*, 118. (Where, in an action for rent, allegation of a leasing for seven years, *held*, competent to prove a verbal lease for that or a shorter period.)

Hauck vs. Craighead, 4 *Hun (N. Y.)*, 561. (Allegation that defendant indorsed the contract; proof that he joined in and signed it, immaterial variance.)

Poirer vs. Fisher, 8 *Bosw.*, 258. (Upon an allegation of agency, and failure to account as agent, plaintiff may recover on proof of a joint adventure and failure to account in respect thereto.)

Compare Marsh vs. Masterton, 101 *N. Y.*, 401. (Holding that on an allegation of partnership and claim for profits, plaintiff could not recover on proof of employment and claim for compensation in proportion to profits. The cases are not necessarily inconsistent, because, although both partnership and joint adventure are in the nature of agency, yet an allegation of agency, being the more general, may be held to include any specific form of agency if defendant is not surprised; whereas an allegation of the specific relation of partnership does not include the different specific relation of master and servant, although each may be a species of agency.)

Sussdorf vs. Schmidt, 55 *N. Y.*, 319. (Under a complaint alleging an agreed compensation for services, immaterial variance to prove a right to recover their value only.)

Rogers vs. Verona, 1 *Bosw. (N. Y.)*, 417. (Allegation that goods were sold and delivered to the defendant; proof that the goods were purchased by defendant, but delivered to a third party for his own use by order of the defendant, immaterial variance.)

Babbett vs. Young, 51 *Barb. (N. Y.)*, 466. (Allegation of due delivery according to a contract specifying the time of delivery; proof of delivery and acceptance after the time provided. *Held*, within the discretion of the Court to direct the jury to find in accordance with the evidence in absence of proof that the defendant had been misled.)

Burghardt vs. Van Deusen, 4 *Allen (Mass.)*, 374. (A judgment should not be excluded by reason of a variance between the allegation and the record, as to the term at which it was rendered.)

Dakin vs. Underwood, 37 *Minn.*, 98; 5 *Am. St. Rep.*, 827. (Under an allegation that the party did an act by his

agent, naming him, the material fact is the act of the party; and a variance in the agent's name, which does not mislead, is immaterial.)

Nash vs. Towne, 5 *Wall. (U. S.)*, 689; s. c., 18 *Law. ed.*, 527.

(Action for non-delivery of goods sold. Proof of sale and payment by a sight draft duly paid will support a declaration of a sale for so much "in hand paid.")

Even under the strict rule of the Common Law, a variance caused by the use of an abbreviation is immaterial if the jury consider the meaning to be the same. *Lewis vs. Few*, 5 *Johns. (N. Y.)*, 29. (Reviewing the English cases. In an action for a libel the libellous matter set forth in the plaintiff's declaration contained the words "U. States" and in the paper produced in evidence "United States." *Held*, the variance was immaterial.)

Davis vs. Town of Guilford, 55 *Conn.*, 354. (Variances are to be disregarded though magnifying the injury and misstating attendant circumstances. *So held* in an action for injury by hole in highway by which plaintiff was thrown to the ground. Failure to prove allegation that the wagon was overturned, etc., disregarded.)

Robbins vs. Diggins, 78 *Iowa*, 521. (Action for injuries to person from negligent driving, *held* error to charge in effect that plaintiff must prove that defendant was coming in the direction alleged.)

Willis vs. Orser, 6 *Duer (N. Y.)*, 322. (Action by owner of chattels under forfeited mortgage, against sheriff for seizure under process against mortgagor. Allegation in complaint that plaintiff became the owner by virtue of the mortgage, and that the mortgagor was in possession until the day of levy, and that previously to the levy, payment of the mortgage had been demanded and refused,—*Held*, to let in evidence that the mortgage had become absolute by demand, and that the mortgagee's possession was only as bailee or agent, under and consistent with the legal possession of the plaintiff.) Opin. by DUER, J.

Craig vs. Ward, 1 *Abb. Ct. App. Dec. (N. Y.)*, 454. (On sale of a mortgage under an allegation that it was represented as good and valid, proof is admissible of representations that it was *bona fide* and well secured, and that the mortgagor had a clear title, in absence of anything to show prejudice to defendant.)

Place vs. Minster, 65 *N. Y.*, 89. (A variance between complaint and the proof as to the details of a fraudulent conspiracy and the mode in which it is carried out, if the proof establishes such conspiracy, and an injury

to plaintiff consequent upon the carrying out of the fraud, is not a failure of proof within the meaning of the Code, and will not justify a dismissal of the complaint without proof that the defendant has been misled.)

Zabriskie vs. Smith, 13 *N. Y.*, 322. (Variance as to the fraudulent representations alleged and proved, immaterial.)

s. p., *Endsley vs. Johns*, 120 *Ill.*, 469 ; *s. c.*, 9 *West.*, 747, 749 ; 12 *N. East*, 247. (Holding it was only necessary for plaintiff to prove substantially the fraudulent representations alleged.)

Packard vs. Pratt, 115 *Mass.*, 405. (Where the gist of the action is fraud and deceit, by which the plaintiff was induced to pay money for an interest in a business, the fact that he alleges a purchase, whereas the instrument proved is a lease, is immaterial.)

§ 967. *Proof of surprise.*—To sustain an objection that a variance (not amounting to a failure to prove an essential allegation in its entire scope and meaning) is ground for excluding evidence or for directing a nonsuit, dismissal, or finding, the objector may be required to show by affidavit that he has been actually misled, and in what respect.¹

But counsel's statement that he has been so misled is sufficient, unless the adverse party calls for proof.²

¹ *Gaty vs. Sack*, 19 *Mo. App.*, 470 ; *s. c.*, 1 *West. Rep.*, 725.

Catlin vs. Gunter, 11 *N. Y.*, 368, 373. (The Court say that under the Code a question of variance is determined "not by the incoherence of the two statements upon their face, and hence inferring their effect upon the state of the preparation of the party, but by *proof aliunde* as to whether the party was actually misled, to his prejudice, by the incorrect statement. In this case the plaintiff did not offer any proof of the character suggested, nor did he even allege that he had been misled. . . . If then the discrepancy was a variance, as defined by these provisions, it should have been regarded as immaterial ; and the only question is, whether it was a fault of that character or a failure of proof as defined by § 171.")

To same effect, *Hauck vs. Craighead*, 4 *Hun (N. Y.)*, 561 ;

Place *vs.* Minster, 65 *N. Y.*, 89, 99; Bennis *vs.* McMahon, 14 *N. Y. Weekly Dig.*, 145.

To somewhat the same effect, in part at least, Dunn *vs.* Durant, 9 *Daly (N. Y.)*, 389; Fischer *vs.* Max, 49 *Mo.*, 404.

Ahrens *vs.* State Bank, 3 *So. Car.*, 401. (Holding that the objector must satisfy the Court immediately that he has been so misled.)

² Griggs *vs.* Howe, 2 *Abb. Ct. App. Dec. (N. Y.)*, 291, aff'g 31 *Barb.*, 100.

§ 968. *Previous knowledge does not disprove surprise.*

—An objection on the ground of surprise is not answered by showing that the objector before the trial knew of the facts sought to be set up.

Southwick *vs.* First National B'k, 84 *N. Y.*, 420, 429.

Sapp *vs.* Aiken, 68 *Iowa*, 699; s. c., 28 *North West. Rep.*, 24.

[The reason is, that the pleading is the formal notice from the adversary of what facts he intends to rely on, and counsel have a right to make preparation accordingly, and to be surprised if other facts, however well known, are offered instead.]

So in Long Island B'k *vs.* Boynton, 105 *N. Y.*, 656, *held*, that the fact that defendant had before the trial moved for leave to serve an answer containing the allegation of usury he sought to prove, but without getting leave, did not avail to show that plaintiff was not surprised at the variance.

§ 969. *Previous knowledge ground for refusing amendment.*—The fact that the party applying for leave to amend at the trial knew before the commencement of the trial of the matters now sought to be proved, and did not seek leave to amend, is sufficient ground for refusing leave at the trial, if the other party relied on the state of the pleadings.

Butler *vs.* Farley, 17 *N. Y. State Rep.*, 109.

To same effect, Muller *vs.* Muller, 21 *N. Y. Weekly Dig.*, 287. (Action to annul marriage because contracted dur-

ing life of a previous spouse; here the amendment sought to introduce fraud as a new ground.)
 s. p., *Cornwall vs. Cornwall*, 30 *Hun* (N. Y.), 573. (Omission to include known grounds in the original complaint, sufficient reason for refusing to allow them to be inserted in the supplemental complaint.)

§ 970. *Amending as to cause of action.*—The Court should not at the trial allow an amendment which brings in a new cause of action.¹ But the same contract or wrong may be alleged in a different manner by amendment at the trial so as to adapt the allegation to the facts.²

¹ *Ball vs. Claffin*, 5 *Pick.*, 303; s. c., 16 *Am. Dec.*, 407, and note. PARKER, C. J., says: The amendment must not be for an additional claim or demand, but only a variation of the form of demanding the same thing.

And see cases contrasted in next note.

² *Actions of Common-Law nature.*

Perrin vs. Keene, 19 *Me.*, 355; s. c., 36 *Am. Dec.*, 759. (Action on note: allegation of original consideration allowed.)

Tilton vs. Cofield, 93 *U. S.*, 163, 166. (Action for price of goods sold: amendment alleging promissory note given therefor, not a new cause of action; and allowable even after attachment levied.)

Secor vs. Law, 4 *Abb. Ct. of App. Dec.* (N. Y.), 188. (Action for work, etc.: addition of cause of action upon an accounting had for the same work, allowable by a referee as well as by the Court.)

[*Compare United States vs. Baudeau* (C. Ct. S. D. N. Y.), 31 *Fed. Rep.*, 697. (Action for balance of account: not error to refuse to allow amendment substituting account stated, asked for purpose of excluding objections to items.)]

Hodges vs. Tennessee Marine and Fire Ins. Co., 8 *N. Y.* 416. (Action on fire policy by grantee of premises pleading absolute title. Amendment alleging conveyance as collateral security allowable.)

Cassell vs. Cooke, 8 *Serg. & R. (Pa.)*, 268; s. c., 11 *Am. Dec.*, 610. (Action on a covenant, with allegation of performance of conditions precedent: amendment alleging excuse for non-performance, allowed after the jury was sworn.)

Bernheim vs. Daggett, 12 *Abb. N. C.*, 316, *aff'd* by the

Ct. of App., without opinion, *id.*, 321. (Action for failure to return execution: excuse for non-return substituted for denial.)

Givens vs. Wheeler, 6 *Colo.*, 149. (Action for breach of warranty: amendment into action for deceit, not allowable, citing cases in different States.)

[*Contra*, *Eighmie vs. Taylor*, 39 *Hun*, 366, an extreme case, and not according to the weight of authority.]

Lane vs. Beam, 1 *Abb. Pr. (N. Y.)*, 65. (Contract for price of goods: amending into tort not allowable, especially after provisional remedy granted.)

Baldwin vs. Rood, 15 *N. Y. Civ. Pro. R.*, 56, 61. (Action founded on deceit in inducing a contract, not amendable into action upon the contract.)

[The power to amend by striking out allegations of tort which are not essential to the cause of action although essential to be proved were they left in the complaint because of the recent statute as to arrest, is another question. It is the better opinion that allegations of tort inserted for that purpose in a complaint on contract may be struck out at the trial.] See also 23 *Abb. N. C.*, 93.

Rosenbach vs. Dreyfuss, 1 *Fed. Rep.*, 391, 395. (Action on a statute: amendment, not as to the facts, but merely connecting the reference to the statute, not a change of the cause of action.)

Hardee vs. Lovett, 83 *Ga.*, 203. (Complaint on note, failing to comply with statutory requirement of giving copy and not giving date: amendment allowable, because not a new cause of action.)

Actions for Tort.

Minter vs. Han. & St. J. R. Co., 82 *Mo.*, 128; *Davis vs. N. Y., Lake Erie & Western R. R. Co.* 15 *N. Y. Civ. Pro. R.*, 62. (Negligence: amendment giving different specifications of the precaution neglected, allowable.)

Cox vs. Murphy, 82 *Ga.*, 623. (Action for knowingly keeping and driving through the streets a vicious animal: amendment adding allegation of negligence in driving it through the streets, allowable; but amendment alleging the negligent keeping of the animal so that it escaped upon the street, not allowable, because not the same cause of action.)

Tumlin vs. Parrott, 82 *Ga.*, 732. (Declaration for treble damages under the statute for killing cattle: amendment adding count for exemplary damages, independent of the statute, not allowable because a new cause of action.)

Parker vs. Rodes, 79 *Mo.*, 88. (Conversion not amendable to fraud and deceit.)

Benson vs. McNamee, 12 *N. Y. State Rep.*, 503; s. c., 46 *Hun*, 681, *mem.* (Action to determine conflicting claims to lands under water: error to refuse to allow amendment showing ownership of uplands as a statutory condition upon which plaintiff alone could have had the grant which he had pleaded.)

Daguerre vs. Orser, 3 *Abb. Pr. (N. Y.)*, 86. (Escape: amendment to charge sheriff as bail, not allowable.)

Even substantial amendment of description not a change of cause of action.

Heilbron vs. Heinlen, 72 *Cal.*, 376; s. c., 14 *Pac. Rep.*, 24; *Reed vs. Cheney*, 111 *Ind.*, 387; s. c., 12 *North East. Rep.*, 717; 10 *Western Rep.*, 252. (Ejectment.)

Emerson vs. Bleakley, 2 *Abb. Ct. App. Dec. (N. Y.)*, 22. (Replevin.)

Nollkamper vs. Wyatt, 27 *Nebr.*, 565; s. c., 43 *North West. Rep.*, 357.

Actions of Common-Law nature; Amending into Equitable.

Broach vs. Kelly, 66 *Ga.*, 148. (Action on note. Amendment alleging deed given as security and praying foreclosure, not allowable.)

White vs. Moss, 67 *Ga.*, 89. (Ejectment: amendment setting up equitable right and demanding cancellation of deeds, not allowable.)

Hobby vs. Bunch, 83 *Ga.*, 1. (Ejectment: amendment demanding that if plaintiff had no title he might recover payment made and foreclose lien on the land, not allowable, because a new cause of action.)

The Georgia Code forbids amendment "adding a new and distinct cause of action or new and distinct parties."

Buffalo & Grand Island Ferry Co. vs. Allen, 12 *N. Y. Civ. Pro. R.*, 64, 70. (Action in replevin for deed, and for damages, not amendable into action for specific performance.)

Bush vs. Tilley, 49 *Barb. (N. Y.)*, 599. (Legal action on contract: amendment so as to ask reformation in order to let in oral evidence, not allowable, because a change of the cause of action.)

[*Compare Rosboro vs. Peck*, 48 *Barb. (N. Y.)*, 92. (Action to recover a sum paid upon the purchase of a partnership interest in excess of what plaintiff had agreed to pay. *Held*, that it was consistent with the complaint and case embraced in the issue to permit plaintiff to amend by asking reformation of the written bill of sale in order to introduce parol evidence of a mistake.) [But

see also *Oakville Co. vs. Double-Pointed Tack Co.*, 105 *N. Y.*, 658.]

Gas Light Co. vs. Rome, W. & O. R. R. Co., 58 *Hun* (*N. Y.*), 119. (Ejectment against a railroad: amendment to an action to restrain defendant from operating its road unless it shall pay for the right, not allowable.)

Actions of Equitable Nature.

Chadwick vs. Burrows, 42 *Hun* (*N. Y.*), 39. (Creditor's suit containing allegation of fraud and also sufficient allegations to recover without proof of fraudulent intent, sustains recovery upon the latter allegation.)

[Compare *Third Nat. Bk. vs. Cornes*, 2 *N. Y. State Rep.*, 543, aff'g 20 *N. Y. Weekly Dig.*, 30.]

Niagara County Nat. Bk. vs. Lord, 33 *Hun*, 557. (Creditor's action against firm: allegation to extend the action to reach property of an individual member not allowable.)

Smith vs. Mackin, 4 *Lans.* (*N. Y.*), 41. (Action to reform or rescind on allegation of mistake: after proof of fraud, amendment to conform, allowed.) s. p., *Knapp vs. Fowler*, 30 *Hun* (*N. Y.*), 512; s. c., 18 *Weekly Dig.*, 230.

Salter vs. Ham, 31 *N. Y.*, 321; *Arnold vs. Angell*, 62 *N. Y.*, 508; *Marsh vs. Masterton*, 101 *N. Y.*, 401. (Action to dissolve partnership and for accounting not the same cause as action to recover for services or otherwise, upon the same contract, regarded as not constituting a partnership.)

Bullock vs. Bemis, 40 *Hun* (*N. Y.*), 623. (Action for partnership accounting: insertion of allegation that settlement relied on by defendant was procured by deceit, allowable.)

Avery vs. N. Y. Central & Hudson River R. R. Co., 106 *N. Y.*, 142, 151. (Action to enjoin breach of a covenant; amendment showing plaintiff's right of privity; allowable.)

Mutual Life Ins. Co. of N. Y. vs. Hoyt, 15 *Weekly Dig.*, 489. (Foreclosure: amendment by inserting allegation of tax clause, allowed.)

Actions of Equitable Nature; Amending to Recover as at Law.

Beck vs. Allison, 56 *N. Y.*, 366. (Specific performance: amendment so as to proceed for damages as at law, allowed.)

s. p., *Hawley vs. Simons* (*Ill.*, 1887), 11 *West. Rep.*, 713.

Halsey vs. Tradesmen's Nat. Bank, 56 *Super. Ct. (J. & S.)*, 7; s. c., 4 *N. Y. Supp.*, 804. (Action for possession of securities and for accounting founded on fraud: not amendable to sustain mere recovery for money received.)

§ 971. *Amending as to defences.*—The Court may allow the answer to be amended at the trial by setting up an entirely new defence,¹ provided it is a mere defence and not a counterclaim.²

¹ Van Ness *vs.* Bush, 14 *Abb. Pr.* (*N. Y.*), 33 ; s. c., 22 *How. Pr.* (*N. Y.*), 481. (And holding that it may be done without imposing costs).

Rowan *vs.* Kelsey, 4 *Abb. Ct. App. Dec.* (*N. Y.*), 125. (Equitable estoppel.)

[*Contra*, Graves *vs.* Cameron, 9 *Daly* (*N. Y.*), 152 ; unsound, see Cunliff *vs.* Del. & Hudson Canal Co., 4 *N. Y. State Rep.*, 775 (allowing statute of limitations to be pleaded); Hatch *vs.* Central Nat. Bank, 78 *N. Y.*, 487.]

² Bowman *vs.* De Peyster, 2 *Daly* (*N. Y.*), 203.

§ 972. *Amending as to capacity.*—Under a complaint stating a cause of action against the defendants in a representative capacity,—for instance, as executors, or as administrators,—plaintiff cannot recover upon proof of a cause of action against them individually, and have judgment *de bonis propriis*.¹

And the Court have no power to amend the complaint at or after trial for the purpose of sustaining such recovery; for this would substitute a new and different cause of action.²

¹ Yarrington *vs.* Robinson, 141 *Mass.*, 450 ; s. c., 2 *New Engl. Rep.*, 47 ; 6 *North East.*, 382. (*Held*, that where the writ described the defendants as administrators of A, and the declaration is upon an account annexed, beginning, "The estate of A, debtor," and alleges that the defendants are indebted as such administrators, the plaintiff could not recover upon proving services rendered before the defendants' appointment, at the request of one.)

In Blackstone Nat'l Bank *vs.* Lane, 80 *Me.*, 165 ; s. c., 13 *Atl. Rep.*, 683, it was held no misjoinder of counts to declare in one against the defendant individually and

in the other against him as trustee, the last clause being only descriptive.

² *Austin vs. Monroe*, 47 *N. Y.*, 360.

Van Cott vs. Prentice, 104 *N. Y.*, 45, aff'g 35 *Hun*, 317.

Griswold vs. Watkins, 20 *Hun (N. Y.)*, 114. (Holding that if defendant is sued "as assignee" in bankruptcy, for a cause on which he cannot be charged in that capacity, judgment in his favor should be affirmed, although if those words had been omitted he might have been personally charged.)

Contra, *Maxwell vs. Harrison*, 8 *Ga.*, 61; s. c., 52 *Am. Dec.*, 385. (Trove. *So held*, on the ground that trove will not lie against a trustee, as such. No one, as representative or fiduciary, can be guilty of a tort.)

[*Contra*, *Waldsmith's Heirs vs. Adms. of Waldsmith*, 2 *Ohio*, 156, 164, 165.]

As to how far the designation of parties may be amended, so as truly to describe the real party, and in the capacity in which he is concerned, see *Reeder vs. Sayre*, 70 *N. Y.*, 180, aff'g 6 *Hun*, 562. (Amendment allowing plaintiffs to claim as surviving partners, instead of as tenants in common, does not change the cause of action.)

Spooner vs. Del., Lackawanna & W. R. Co., 115 *N. Y.*, 22, 30. (Amendment substituting name of infant instead of guardian *ad litem* as a party, allowable.)

Rabb vs. Rogers, 67 *Tex.*, 335; s. c., 3 *South West. Rep.*, 303. (Amendment naming guardian as plaintiff instead of the infant, allowable.)

Wolscheid vs. Thome, 76 *Mich.*, 265; s. c., 43 *North West. Rep.*, 12. (Adding allegations showing representative capacity, allowable.)

McDonald vs. Ward, 57 *Conn.*, 304. (Amendment striking out words which made defendant a party in his representative capacity.)

s. p., *Tighe vs. Pope*, 16 *Hun (N. Y.)*, 180.

Otherwise where the amendment, to charge defendants individually, when sued in a representative cause of action, was asked after trial, to sustain a verdict for plaintiff. *Van Cott vs. Prentice*, 104 *N. Y.*, 45. (The Court say: the amendment substituted a new and different cause of action, and the defendants as individuals had been furnished with no opportunity to defend.)

§ 973. *Fact implied*.—The omission to allege specifically a fact which is only implied from other facts alleged, may be cured by amendment at the trial.

Thayer vs. Marsh, 75 *N. Y.*, 340, aff'g 11 *Hum*, 501. (Omission to aver privity, in action on assumption clause.)

§ 974. *Inherent power*.—At Common Law, and irrespective of any statutory authority, a Court of general jurisdiction has inherent power to allow a party to amend his pleading in order to cure a material variance, at any time before verdict found,¹ wherever justice will be promoted thereby without injury to the adverse party; but in every such case, if the opposite party requests it, the jury should be discharged, the adverse party allowed to amend his pleadings or to plead anew to the pleading so amended, and the cause be continued.²

This power extends to pleadings originally framed in another court and brought into the trial court by removal.³

¹ 1 *Abb. New Pr. & F.* 57, n. (3).

Hatch vs. Centr. Nat. Bk., 78 *N. Y.*, 487, overruling in effect *Robertson vs. Robertson*, 9 *Daly (N. Y.)*, 44, *dictum* to the contrary.

Travis vs. Peabody Ins. Co., 28 *W. Va.*, 583; s. c., 16 *Ins. L. J.*, 161.

Knott vs. Taylor, 99 *N. C.*, 511; s. c., 6 *South East. Rep.*, 788.

Eberly vs. Moore, 24 *How. (U. S.)*, 147. (Equity.)

Neale vs. Neales, 9 *Wall. (U. S.)*, 1. (Equity; bills and answers.)

The Charles Morgan, 115 *U. S.*, 69; s. c., 29 *Law. ed.*, 316; s. c., 5 *Sup. Ct. Rep'r*, 1172. (Admiralty.)

Anonymous, 1 *Gall. (U. S. C. Ct.)*, 22. (Criminal case.)

² *Travis vs. Peabody Ins. Co.*, 28 *W. Va.*, 583; s. c., 16 *Ins. L. J.*, 161, and *cas. cit.*

³ *Lalleman vs. Fere*, 18 *Abb. N. C. (N. Y.)*, 56; s. c., as *Lalteman vs. Fere*, 11 *Civ. Pro. R.*, 217.

§ 975. *Not precluded by stipulation to try issue*.—A

stipulation to try the case upon the issue raised by the pleadings does not preclude an amendment of those pleadings at the trial.

Ballin vs. Dillaye, 37 *N. Y.*, 35; s. c., 35 *How. Pr. (N. Y.)*, 216.

§ 976. *Leave to amend does not supersede waiver of jury.*—Even where trial by jury has been waived, the allowance of an amendment by adding a count does not necessarily entitle the defendant to a trial by jury of the new issue.

Bamberger vs. Terry, 103 *U. S.*, 40, 43. (Action by receiver for conversion; amendment adding allegation of conversion prior to plaintiff's appointment.)

§ 977. *Bill of particulars.*—A bill of particulars is amendable at the trial as if it were a part of the pleading,¹ and it is in the discretion of the Court even to allow a credit admitted in it to be withdrawn.²

¹ *Melvin vs. Wood*, 3 *Abb. Ct. App. Dec. (N. Y.)*, 272; s. c., 3 *Keyes (N. Y.)*, 533. (Substitution of new bill allowed by referee.)

Blunt vs. Cooke, 4 *Mann. & Gr.*, 458. (Insertion of additional items, allowed by Court, pending reference.)
s. p., *Moses vs. Taylor*, 6 *Mack. (D. C.)*, 255; s. c., 11 *Cent. Rep.*, 724.

² *Case vs. Pharis*, 106 *N. Y.*, 114; s. c., 7 *Cent. Rep.*, 779; 12 *North East. Rep.*, 431.

§ 978. *Powers of United States Court.*—The United States Circuit and District Courts, in addition to the powers of amendment conferred on them by U. S. R. S., 948, have in civil causes (other than in equity and admiralty, and *in rem* for forfeiture) the powers of amendment in respect to pleadings and the forms and modes of

proceeding conferred by the State law on the courts of record in the same State.

Norton *vs.* Dover, 14 *Fed. Rep.*, 106.

s. p., Erstein *vs.* Rothschild, 22 *Fed. Rep.*, 61.

Townsend *vs.* Jemison, 7 *How. (U. S.)*, 706, 722.

Bond *vs.* Dustin, 112 *U. S.*, 604. (Sustaining verdict though one count be defective.)

[See Henderson *vs.* Louisville R. Co., 123 *U. S.*, 61. (Holding that U. S. Court allowing amendment may apply conditions or restrictions sanctioned by State practice.)]

The United States Court may follow even the most liberal rule of amendment, if sanctioned by the State practice. West *vs.* Smith, 101 *U. S.*, 263.

IV.—SUBMISSION AFTER EVIDENCE TAKEN.

[Including Motion for Nonsuit or Dismissal; Motion to direct a verdict; Requests for Instructions to the Jury; and Requests for Findings to be made by the Judge or Referee.]

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| 1. POWER AND DUTY OF THE COURT,
§§ 979-981. | 6. SWORN DENIALS AND EFFECT OF
OMISSION, §§ 1020-1023. |
| 2. SUFFICIENCY AND CONSISTENCY
OF THE PLEADINGS, AND OF THE
CONTENTIONS UPON THE EVIDENCE,
§§ 982-990. | 7. FACTS OCCURRED PENDING SUIT,
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| 3. BURDEN AND FAILURE OF PROOF,
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| 4. GROUNDS OF RELIEF OR DEFENCE
WAIVED BY NOT PLEADING,
§§ 1002-1017. | 9. CONFORMITY OF FINDINGS TO
THE ISSUE AND ADMISSIONS,
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| 5. OMISSION TO PLEAD WAIVED BY
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MAND OR JUDGMENT, §§ 1037-
1055. |
| | 11. AMENDMENT, § 1056. |

1. POWER AND DUTY OF THE COURT.

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| § 979. Pleadings read without being
put in evidence. | § 980. Defining the issues for the jury.
981. State practice in U. S. Court. |
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§ 979. *Pleadings read without being put in evidence.*
—Under the New Procedure the pleadings in the cause

which form the issue on trial, are before the court and jury; and may, without having been formally put in evidence, be read and commented upon for the purpose of defining the issue and showing what is admitted, and therefore not within the issue.

Todd *vs.* Bishop, 136 *Mass.*, 386.

Holmes *vs.* Jones, 121 *N. Y.*, 461; Tisdale *vs.* Del. & H. Canal Co., 116 *id.*, 416. [These cases qualify the rule stated in the first editions of *Civil Jury Brief*, p. 69, § 11.]

As to whether a plea or defence raising one issue is available evidence as an admission under another issue, see Nudd *vs.* Thompson, 34 *Cal.*, 39; *s. p.*, Lyons *vs.* Ward, 124 *Mass.*, 364, in the negative; and §§ 643 and 458; and *Civil Jury Brief*, p. 67.

§ 980. *Defining the issues for the jury.*—A party has a right to have the jury instructed what are the issues upon the pleadings, and what is admitted therein, so far as necessary for their guidance.¹

It is error to submit to the jury to say whether a fact has been admitted by the pleadings,² or to so instruct as to leave it to them to determine what has or what has not been admitted.³

¹ McKinney *vs.* Hartman, 4 *Iowa*, 154. (Holding it error to refuse; and disapproving the stating to them as a mere general rule of pleading that what is not denied is admitted, leaving it to them to apply it.)

Porter *vs.* Knight, 63 *Iowa*, 365; *s. c.*, 19 *North West. Rep.*, 282; Bryan *vs.* Chicago, etc., Ry. Co., 63 *Iowa*, 464; *s. c.*, 19 *North West. Rep.*, 295. (Holding it error to give the jury the pleadings for this purpose at least without clear instructions as to what the issues were.)

² Bond *vs.* Corbett, 2 *Minn.*, 248. (Error to instruct the jury that plaintiff could recover the value of her services where a special contract set up in the answer was admitted by the reply.)

³ Yeiser *vs.* Brown, 6 *Bush (Ky.)*, 190. (Holding it error to instruct the jury that "in so far as defendants' answer sets out the terms of the contract," and "in so far as it states the acts done by defendants in performance of

said contract," it must be taken as true; for this was leaving questions of pleading to the jury. The Court should inform them what facts are to be considered as true.)

Dassler vs. Wisley, 32 *Mo.*, 499. (Action for work and labor. Error to instruct, at plaintiff's request, "that all the material allegations in the plaintiff's petition, not specifically denied by the defendant's answer, will, for the purposes of this action, be taken as true." The Court say: "It is proper for the Court to state the issues to the jury, but it is not proper to refer the jury to the pleadings to ascertain them.")

§ 981. *State practice in U. S. Court.*—Under U. S. R. S., § 914, conforming the practice in the U. S. Circuit and District Courts in civil causes (other than in equity, admiralty, and *in rem* for forfeiture), to the practice in the courts of record of the State in which they are sitting,—the Court cannot nonsuit for inappropriateness of the pleading to the cause of action, if the State Court practice allows a recovery on such facts under such a pleading.

Taylor vs. Brigham, 3 *Woods (U. S. C. Ct.)*, 377. (Objection that action should have been case and not trover, overruled because case would lie in the State court.)

Sawin vs. Kenny, 93 *U. S.*, 289. (Action on joint contract; judgment against one of several defendants. State law followed.)

s. p., *Morgan vs. Eggers*, 127 *U. S.*, 63. (Holding State law as to recovery against part of premises or part of defendants in ejectment applies in U. S. Court.)

[*Compare*, per HUGHES, J., in *Baltimore & O. R. Co. vs. Hamilton*, 16 *Fed. Rep.*, 181, refusing replevin because the State practice, and the Common Law did not allow it.]

2. SUFFICIENCY AND CONSISTENCY OF THE PLEADINGS, AND OF THE CONTENTIONS UPON THE EVIDENCE.

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| § 982. Dismissal for insufficiency. | § 987. Effect on the defence of plain- |
| 983. Immaterial issues should not be
submitted. | tiff's statement of separate
counts for same recovery. |
| 984. Which cause of action, in am-
biguous complaint. | 988. Denial and avoidance, |
| 985. Alternative ground for conclu-
sion of fact. | 989. Inconsistent defences. |
| 986. Inconsistency in separate counts. | 990. Sufficiency of defence not ad-
mitted by not demurring. |

§ 982. *Dismissal for insufficiency.*—If a motion to dismiss the complaint for not stating facts sufficient to constitute a cause of action is not made until after the evidence is in, it should not be granted if the cause of action has been proved, and defendant has not been surprised or prejudiced.

Miller vs. White, 8 *Abb. Pr. N. S. (N. Y.)*, 46 ; s. c., less fully, 57 *Barb. (N. Y.)*, 504 (rev'd, on another ground, in 50 *N. Y.*, 137).

Rector vs. Clark, 78 *N. Y.*, 21, rev'g 12 *Hum (N. Y.)*, 189.

McGoldrick vs. Willets, 52 *N. Y.*, 612.

s. p., on appeal, *Knapp vs. Simon*, 96 *N. Y.*, 284 ; s. c., 6 *N. Y. Civ. Pro. R.*, 1, rev'g 49 *N. Y. Super. Ct. (J. & S.)*, 17.

§ 983. *Immaterial issues should not be submitted.*—A question of fact raised by the pleadings and evidence, which whether found one way or the other does not in itself aid the determination of the cause, should not be submitted to the jury.¹ Nor should the instructions to the jury leave it to them to discriminate between what is and what is not material.²

¹ *Cuthbertson vs. North Carolina Home Ins. Co.*, 96 *No. Car.*, 480 ; s. c. 16 *Ins. L. J.*, 465. (Action on fire policy : refusal to submit issues and evidence as to false representations and as to compliance with conditions, sustained.)

s. p., *Lusk vs. Perkins*, 48 *Ark.*, 238; s. c., 2 *South West. Rep.*, 847.

* *Endsley vs. Johns*, 120 *Ill.*, 469. (Error to instruct the jury they are to find for a party if the material part be proved; holding, however, that as all the representations in question were material, the error was merely formal and harmless.)

§ 984. *Which cause of action, in ambiguous complaint.*—If the Court, at the close of the evidence on a trial under an ambiguous complaint, rules that it must go to the jury as an action only for a cause specified by the Court, admissions in the answer pertinent only to the other cause of action suggested in the complaint must be conformed to and construed by the evidence, and not made the ground of liability more extended than the proofs warrant.

Von Latham vs. Rowan, 17 *Abb. Pr. (N. Y.)*, 237; s. c., less fully, as *Von Latham vs. Libby*, 38 *Barb. (N. Y.)*, 339.

s. p., *Leprèll vs. Kleinschmidt*, 112 *N. Y.*, 364, 367; s. c., 21 *N. Y. State Rep.*, 30, rev'g 17 *N. Y. State Rep.*, 231. (Holding that a complaint which contained the substantial elements of a complaint in ejectment, but commingled with it allegations that the eaves of defendant's building extended over the strip of which plaintiff sought to recover possession, was, after answer and verdict, a sufficient complaint in ejectment, under the liberal rule established by the Code for the construction of pleadings; for even if the projection of eaves would not sustain the action, the appellate court should presume that entry and unlawful detention of property had been proved.)

§ 985. *Alternative ground for conclusion of fact.*—If objection to pleading or evidence has not been seasonably taken, a party may properly be allowed to go to the jury for a recovery on a conclusion of fact which may be sustained on either of two inconsistent grounds alleged in the alternative, and in support of which there is evidence for the jury. Both grounds may be submitted

to the jury with instructions to find for the party if either is found in the affirmative.

Everitt *vs.* Conklin, 90 *N. Y.*, 645.

Murray *vs.* N. Y. Life Ins. Co., 96 *N. Y.*, 614.

s. p., Tarbell *vs.* Royal Exch. Shipping Co., 110 *N. Y.*, 17.

s. p., Norton *vs.* Dreyfuss, 106 *N. Y.*, 90, 95, rev'g 51 *Super. Ct. (J. & S.)*, 491.

Chatfield *vs.* Simonson, 92 *N. Y.*, 209.

Jackson *vs.* Van Slyke, 52 *N. Y.*, 645. (Holding it error to refuse to submit the case to the jury, and that the objection of inconsistency could not be started in the appellate court.)

s. p., Turner *vs.* Yates, 16 *How. (U. S.)*, 14, 25. (Inconsistent lines of proof admitted under one allegation.)

§ 986. *Inconsistency in separate counts.*—Where plaintiff alleges several alternative or concurrent grounds for the same recovery, and they are such as the statute regulating joinder of actions does not exclude from being joined, he may prevail on proof of either, though they are in legal theory inconsistent, if there is not necessarily an absolute inconsistency in point of fact.

Goings *vs.* Patten, 1 *Daly (N. Y.)*, 168; s. c., 17 *Abb. Pr. (N. Y.)*, 339. (*Dictum*, that it is entirely consistent with the defence of an account stated, to plead also a copy of the account showing the items on which the party means to rely in event of failing to prove the account stated.)

Williams *vs.* Freeman, 12 *N. Y. Civ. Pro. R.*, 334. (Complaint by master and part owner of vessel for his share of vessel's earnings, set forth a claim on an account stated, and also a cause for an accounting as to moneys received by defendant as joint owner. *Held*, error to dismiss merely for failure to prove the latter cause.)

s. p., Straus *vs.* Heyenga, 5 *N. Y. State Rep.*, 37. (Action alleging partnership, dissolution, and award of amount due from defendant partner to plaintiff. Also asking an accounting.)

Krower *vs.* Reynolds, 99 *N. Y.*, 245, rev'g 19 *Weekly Dig.*, 383. (Contract; and judgment subsequently recovered on the contract. *Held*, that the fact that the judgment merged the contract was not decisive of the question

whether a recovery on the contract without proof of the judgment could be sustained.)

[*Compare Teel vs. Yost*, 56 *Super. Ct. (N. Y.)*, 456 ; s. c., 22 *N. Y. State Rep.*, 415; 5 *N. Y. Supp.*, 5. (Here the complaint set out in full a promissory note given in Pennsylvania, and further alleged that the plaintiff entered judgment thereon in a Pennsylvania court and under Pennsylvania law ; that the plaintiff was the owner of the judgment, and that neither the note nor the judgment had been paid. *Held*, that there was but one cause of action, and that upon the judgment ; and to entitle plaintiff to recover, he must prove a valid judgment.)]

§ 987. *Effect on the defence of plaintiff's statement of separate counts for same recovery.*—Where tort and contract can be joined as separate grounds of recovery on the same transaction, the fact that a defence appropriate to one only is pleaded and sustained, does not prevent plaintiff from recovering upon the other. Where they cannot be joined, and plaintiff by his pleading has waived the tort, stating it only incidentally as ground for rescission or for raising an implied contract, both counts are on contract, notwithstanding the allegations of tort ; and a defence sufficient for an action sounding in contract avails against both counts.

Morse vs. Hutchins, 102 *Mass.*, 439.

§ 988. *Denial and avoidance.*—It is the better opinion that under the New Procedure the right of a party to go to the jury on a defence in avoidance, in support of which he has given evidence, is not affected by the existence in a separate division of his answer, or reply, of the denial of the fact sought to be avoided ; for an avoidance no longer necessarily involves confession.

Swift vs. Kingsley, 24 *Barb. (N. Y.)*, 541. (Nonsuit on the ground that an admission made in one defence was available against the others, is error. Each answer must stand by itself, as a complete defence, and the

plaintiff must recover upon the whole record. Judgment reversed.)

Lake Shore & M. S. Ry. Co. vs. Warren (*Wym.*, 1885), 6 *Pacif. Rep.*, 724. (Action against carrier for trunk. Denial; and separate defence of tender of the trunk and readiness to deliver it. *Held*, error to instruct the jury that the latter defence admitted all but the amount of damages; for the carrier might have come into possession by finding, after suit brought. Judgment therefore reversed.)

Tobin vs. Western Mut. Aid Soc., 72 *Iowa*, 261; s. c., 33 *North West. Rep.*, 663.

For other authorities, see §§ 642, etc., 706, *n*.

Compare, as to express admission :

Sexton vs. Rhames, 13 *Wisc.*, 99. (Action for lands. General denial; and also a special answer admitting the alleged legal title.)

Rhinehart vs. Whitehead, 64 *Wisc.*, 42; s. c., 24 *North West. Rep.*, 401. (*Dictum*, that an express admission in an affirmative defence avails plaintiff, although there be a general denial. [Citing *Sexton vs. Rhames*, 13 *Wisc.*, 99; *Hartwell vs. Page*, 14 *id.*, 49; *Farrell vs. Hennessy*, 21 *Wisc.*, 632.])

§ 989. *Inconsistent defences*.—Under the New Procedure a plaintiff is not entitled to judgment because defendant has pleaded inconsistent defences. In such case defendant may elect on which defence he will rely, and conform his pleading to his choice. But such election does not deprive the plaintiff of the benefit of the inconsistent defence as evidence of an admission.

Breunich vs. Weselman, 100 *N. Y.*, 354. (*So held* where both usury and tender were pleaded.)

Chatfield vs. Simonson, 92 *N. Y.*, 209. (A defendant is not precluded in an action on contract under a general denial from relying on plaintiff's non-performance as bar to the action, although he has set up the facts showing plaintiff's violation of the contract as a separate defence and alleges a right of set-off.)

Bruce vs. Burr, 67 *N. Y.*, 237. (Action on contract. *Held*, defendant might set up both a rescission of the contract and a breach of warranty. Motion to compel election properly denied.)

Hamburger vs. Baker, 35 *Hun* (*N. Y.*), 456. (The old rule

preventing a defendant from joining a plea in abatement with one in bar is no longer in force; and where matters in abatement and bar are pleaded, the pleading of the latter will not waive the former.)

Goodwin vs. Wertheimer, 99 *N. Y.*, 149. (In an action to recover goods, defendant may join with his defence that he is a *bona-fide* holder, a defence that there has not been a sufficient demand.)

§ 990. *Sufficiency of defence not admitted by not demurring.*—At Common Law, going to trial on a frivolous plea without demurring to it, is not an admission that the plea if established by evidence is a defence, and does not justify instructing the jury that it is.

United States vs. Dashiel, 4 *Wall. (U. S.)*, 182. (The Court say “under no system of pleading can the judge be required to give an instruction contrary to law.”)

[*Compare*, for the rule in equity, *Bean vs. Clark (Circ. N. D. N. Y.*, 1887), 30 *Fed. Rep.*, 225. WALLACE, J., says: “Having taken issue upon the plea, the complainant cannot now assert that the facts alleged are not a good defence to the bill. *Story Eq. Pl.*, 697; *Rhode Island vs. Massachusetts*, 14 *Pet. (U.S.)*, 210; *Myers vs. Dorr*, 13 *Blatchf. (U. S. C. Ct.)*, 22; *Bogardus vs. Trinity Church*, 4 *Paige (N. Y.)*, 178; *Birdseye vs. Heilner*, 26 *Fed. Rep.*, 147. Equity rule 33, promulgated by the Supreme Court in 1842, declares that if upon an issue the facts stated in the plea be determined for the defendant, they shall ‘avail him as far as in law and in equity they ought to avail him.’ It may be that this rule was intended to relieve a complainant from the hardship of having his suit barred when the facts stated are determined in favor of defendant, although they would not be a defence. But the language is consistent with the meaning that if the plea extends to part only of the matters of the bill the suit is to be barred so far as the plea extends; and if this is the correct interpretation, the rule does not change the pre-existing practice. The effect of rule 33 has not been considered by the Supreme Court in any reported case; and until that Court passes upon the question, this Court should adhere to the decisions in *Myers vs. Dorr* and *Birdseye vs. Heilner*.”]

3. BURDEN, AND FAILURE OF PROOF.

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| § 991. General denial puts burden on plaintiff. | § 997. Omitted allegation supplied from adversary's pleading. |
| 992. Amendment. | 998. Burden to prove negative allegation. |
| 993. Failure to prove immaterial allegation. | 999. Order of proof of avoidance of defence. |
| 994.—to prove proper but unnecessary allegation. | 1000. Right of rebuttal. |
| 995. Plaintiff need not prove his claim to the full extent. | 1001. Admission of allegation of contract. |
| 996. Indefinite or uncertain allegation. | |

§ 991. *General denial puts burden on plaintiff.*—A general denial imposes upon plaintiff the burden of proving every fact essential to sustain a recovery.

Lafayette, etc., R. R. Co. *vs.* Ehman, 30 *Ind.*, 83; Adams Express Co. *vs.* Darnell, 31 *id.*, 20.

At Common Law the general issue varied in different actions, and in many cases relieved plaintiff from proving some facts which, if they had been specially denied, he would have been required to prove.

§ 992. *Amendment.*—A defence which ought to be specially pleaded, but was not, should not be received under a general denial, and then sustained by amending the answer to conform to the proof; for this would "change substantially the claim or defence," and such amendment ought only to be allowed on application for leave to amend, and upon just terms.

Carpenter *vs.* Goodwin, 4 *Daly (N. Y.)*, 39. (Reversing judgment for error in receiving such evidence.) *Contra*, as to power to amend before evidence, §

§ 993. *Failure to prove immaterial allegation.*—A nonsuit cannot be ordered nor a verdict directed on account of failure to prove an immaterial allegation. It is

enough to prove those allegations that are essential to make out the cause of action or defence obviously intended on the face of the pleadings, without proving those which are superfluous, unless their insertion amounts to an unsuccessful attempt to state a different cause of action, and has thereby misled the adverse party to his prejudice.¹

Failure to prove a fact expressly in issue on the pleadings does not impair the right of the party to have a verdict directed, if by reason of the admission of other facts alleged, the fact denied has become not essential.²

¹ *Conaughty vs. Nichols*, 42 *N. Y.*, 83, 87. (Complaint alleged consignment to defendants as factors, receipt and sale by defendants, balance due plaintiff, and refusal of defendants to pay on demand; adding, "and have converted the same to their own use, to the damage of the said plaintiff in the sum," etc. *Held*, error to deny leave to plaintiff at close of evidence to amend by striking out allegation of conversion, and to grant defendant's motion for nonsuit on ground that complaint was in tort and proof was of a contract. Judgment reversed.)

Bedell vs. Carll, 33 *N. Y.*, 581. (Legal action on promissory note by daughter and indorsee of payee, deceased, alleging indorsement and delivery by payee to plaintiff as a gift, and ownership of plaintiff, all of which was denied. Plaintiff proved note with ordinary indorsement, and gave no evidence as to gift. *Held*, not error to deny motion for judgment on ground of insufficiency of proof. Judgment affirmed.)

² *Roberts vs. Graves*, 4 *N. Y. State Rep.*, 594. (Complaint on promissory note against maker alleged that it was made and delivered to plaintiffs, also that plaintiffs were partners. Former allegation was not denied, but partnership was denied. *Held*, an immaterial issue, and judgment reversed for error of court below in holding it material.)

§ 994. — *to prove proper but unnecessary allegation.*
—An allegation which, though proper, is presumed by the law to be true without proof, although properly inserted

in the complaint, need not be proved unless evidence to the contrary has been given.

Cheraw, etc., R. R. Co. vs. Broadnax, 109 *Pa. St.*, 432; s. c., 2 *Eastern Rep.*, 257, 259. (Action on general average bond. The Court (CLARK, J.) say: "The averment in the plaintiff's declaration that the schooner was stanch and seaworthy was, under the implication arising out of the contract of affreightment, a proper one; perhaps it was not essential, but it did not require any proof in the first instance in support of it. There are affirmative averments, deemed essential in formal pleading, which stand upon the presumption of their truth until that presumption is rebutted, for example, in an action for defamation the good repute of the plaintiff is always averred, but need not be proved until it is attacked.")

§ 995. *Plaintiff need not prove his claim to the full extent.*—Plaintiff need not prove the entire claim alleged in his pleading. It is sufficient if the substance of the issue be proved.

¹ *Chitt. Pl.*, 16 *Am. ed.*, 401, 408.

[As to special injuries, see §§ 826, etc., *Damages*.]

Van Rensselaer's Executors vs. Gallup, 5 *Den. (N. Y.)*, 454. In an action against the assignee of a lessee for non-payment of rent, the declaration alleged that all the estate of the lessee in the premises leased had been assigned to the defendant. The evidence showed that he was assignee of a part only of the premises. *Held*, the variance was not fatal, though the quantity of land held by the defendant might be material on the question of damages. By showing that the defendant was assignee of part of the premises the substance of the issue was proved.)

Louisville, N. A. & C. R. Co. vs. Shires, 108 *Ill.* 617. In a suit for personal injuries, where plaintiff alleged several independent acts of negligence, an instruction that plaintiff must prove every material allegation of his declaration was held properly refused. Plaintiff was under obligation to prove only enough to show a good cause of action.)

§ 996. *Indefinite or uncertain allegation.*—Indefiniteness and uncertainty in an allegation of a material fact is

not ground for excluding the question of fact from the jury if evidence of the fact has been given without objection.

Liverpool & Lond. Ins. Co. vs. Gunther, 116 *U. S.*, 115, 127. (Action on fire policy. Obscure allegation of breach of condition. *Held*, error to withdraw from the jury the evidence of the breach, after the fact had been the subject of evidence on both sides, and the defendant had moved for a verdict on that ground, thus giving plaintiff an opportunity to give further evidence, or require amendment of the answer. MATTHEWS, J., says: "We think the matter ought to have been either submitted to the jury or put in shape for such submission, if the rights of the adverse party required any change in the pleadings, or opportunity for the production of other evidence. By the course actually taken the defendant was deprived of the benefit of a defence, legitimately arising upon the evidence actually in the case, admitted without objection; and this, we think, was contrary to the practice established under the laws of New York, as appears from the cases cited of *N. Y. Cent. Ins. Co. vs. Nat. Protection Ins. Co.*, 14 *N. Y.*, 85; *Williams vs. Mech. & Traders' Fire Ins. Co.*, 54 *N. Y.*, 577; and *Williams vs. People's Fire Ins. Co.*, 57 *N. Y.* 274.") [Citing also *N. Y. Code Civ. Pro.*, §§ 539, 540, as to variance.]

Expressly taking issue upon an allegation by replication and going to trial admits it to be sufficiently explicit for the purposes of the trial, however imperfect it may be. *Wooster vs. Muser*, 20 *Fed. Rep.*, 162. (Infringement of patent: answer denying information as to infringement, and denying damages, cannot be objected to as insufficient after evidence taken.) [Citing *Young vs. Grundy*, 6 *Cranch (U. S.)*, 51; *Story Eq. Pl.*, § 877.]

§ 997. *Omitted allegations supplied from adversary's pleading.*—If an essential allegation omitted from the complaint is supplied in the answer, though coupled there with matter in avoidance, and if evidence is given without objection upon the theory that the question is in issue, and the jury find upon it, the omission of the allegation is cured.¹ But plaintiff cannot recover on a wholly

different cause of action from that which he has alleged, although it is disclosed by defendant's pleading.²

¹ *Schenck vs. Hartford Fire Ins. Co.*, 71 *Cal.*, 28; s. c., 11 *Pacif. Rep.*, 807. (Action on fire policy without alleging the application. Answer setting out the application and alleging a breach. FOOTE, C., said: "By the choice of the defendant, the fact, which was essential to the plaintiff's recovery, which had been omitted to be pleaded in his complaint, was so pleaded in the defendant's answer with a view to defeat the plaintiff's recovery, that a jury was enabled, upon evidence before it, to pass upon the issue raised and tendered by the defendant. If the defendant has been beaten upon its own chosen ground of battle, which but for its pleading could not have been there fought, we cannot see any good reason to reverse the judgment.)

² *Brandt vs. Shepard*, 39 *Minn.*, 454; s. c., 40 *North West Rep.*, 521. (The complaint charged that the two defendants as partners had received certain money. The separate answer of one of the defendants contained a general denial, and also contained allegations of certain transactions between him individually and the plaintiff, and growing out of which it was admitted that a certain sum was due the plaintiff. *Held*, the plaintiff could not recover this amount, as it formed no part of the cause of action set forth in the complaint, and the Court below did not err in dismissing the action for want of evidence, after the plaintiff had rested.)

[*Compare Cook vs. Smith*, 54 *Iowa*, 636. Action for work and labor for a fixed sum; the answer set up that work was to be paid for by a certain commission on its value. *Held*, that plaintiff, if entitled, might recover on the contract as alleged by defendant.]

§ 998. *Burden to prove negative allegation.*—If issue has been taken on a material allegation, the party who made the allegation is not excused from proving it by reason of its being a negative allegation.¹

But plaintiff need not prove an unnecessary negative allegation of what, if affirmatively established, would be a matter of defence in avoidance of his cause of action.² Nor is defendant required to prove a negative allegation.

which merely puts in issue a material allegation of the plaintiff.³

¹ *Roberts vs. Chittenden*, 88 *N. Y.*, 33. (Action against carrier for non-delivery; plaintiff must give some evidence of non-delivery.) [Compare *Civ. Jury Brief*, p. 85.]

² *Andrews vs. Moller*, 37 *Hun (N. Y.)*, 480. (Unnecessary allegation of conversion. The previous decision to the contrary in the same case in 20 *N. Y. Weekly Dig.*, 377, is unsound, and must be deemed overruled.)

Douglas vs. Hennessy, 15 *R. I.*, 281; s. c., 10 *Atl. Rep.*, 583; 5 *New Eng.*, 94. (Action on a penal bond for the performance of a special contract. *Held*, the obligation of the defendant being defeasible by the performance of a condition on his part, the burden is on defendant to prove it, even though plaintiff has unnecessarily alleged non-performance of the condition.)

³ *Newton vs. Newton*, 77 *Tex.*, 508; s. c., 14 *South West. Rep.*, 157. (Legatee against maker of a note. *Held*, not error to refuse to charge that a sworn plea denying consideration throws burden of proof on plaintiff, under Rev. St. Tex., arts. 1265, 4488. The sworn plea did not shift the burden of proof, but merely put the consideration in issue.)

§ 999. *Order of proof of avoidance of defence.*—It is in the discretion of the Court to allow plaintiff to give evidence, as a part of his original case, of facts constituting an avoidance of a defence pleaded by defendant, even though plaintiff has not pleaded such facts.¹

It is the better opinion that where plaintiff has pleaded such facts, they are to be regarded as made material as a part of his original case if defendant has pleaded the anticipated defence.²

¹ *Baylis vs. Cockcroft*, 81 *N. Y.*, 363.

Hadcock vs. O'Rourke, 6 *N. Y. Sup.*, 549.

² See also § 127.*

* In a note in 25 *Abb. N. C. (N. Y.)*, 120, I have collected the cases more fully than space allows here.

§ 1000. *Right of rebuttal.* — If a party who might rely on a concession presented by an allegation or admission in his adversary's pleading does not claim to do so, but gives evidence instead thereof, it is not error to receive rebutting evidence on the point from the adverse party, although it controverts his own concession.

Tucker vs. Ely, 20 *N. Y. Weekly Dig.*, 66. (Action for value of services. The Court say, that as plaintiff did not choose to rest his claim as to the value of his services upon the ground that it was admitted by not denying, but gave evidence on the question, defendant ought to have been permitted to rebut.)

§ 1001. *Admission of allegation of contract.*—If a contract is fully pleaded, and there is no denial as to it, not only its existence is admitted, but also its binding effect, if no infirmity appears on its face, nor in the complaint in which it is set forth, nor in new matter in the answer.

Wiltsie vs. Village of Greenbush, 4 *N. Y. State Rep.*, 814. (Holding that therefore an objection that plaintiff failed to prove its validity was unavailing.)

s. P., *Schreyer vs. Mayor*, etc., of N. Y., 39 *N. Y. Super. Ct. (J. & S.)*, 1.

4. WHAT GROUNDS OF RELIEF OR DEFENCE WAIVED BY NOT PLEADING.

[See also §§ 659–661.]

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|----------------------------------------------------------------------------------|-----------------------------------------------------------|
| § 1002. Estoppel: defendant's waiver by not pleading. | § 1008. Estoppel proved may avail. |
| 1003. Plaintiff's waiver of estoppel by not pleading when there was opportunity. | 1009. Equitable regard to estoppel. |
| 1004. What is "opportunity to plead" at Common Law. | 1010. Illegality when available. |
| 1005. The same—under New Procedure. | 1011. Variance. |
| 1006. Waiver of conclusiveness of technical estoppel. | 1012. Laches, avails though not pleaded. |
| 1007. Estoppel proved by both parties. | 1013. Statute of Frauds. |
| | 1014. Proper plaintiff. |
| | 1015. Infancy of plaintiff. |
| | 1016. Subrogation. |
| | 1017. Rebuttal of cause of action proved but not alleged. |

§ 1002. *Estoppel: defendant's waiver by not pleading.*—At Common Law, and under the New Procedure, if plaintiff has pleaded the principal fact in such manner that defendant by pleading a record or specialty could have shown an effectual bar,¹ defendant, if he has not so pleaded it as an estoppel, but has pleaded instead to the principal fact, has waived the estoppel; and if the matter which might have raised the estoppel has been proven, it is not conclusive, but only evidence for the jury.²

¹ That he may always do so in case of technical estoppel, see § 875. For the conflict of authority as to Equitable estoppel, see §§ 878–881.

² *Trevivan vs. Lawrance*, 1 *Salk.*, 276.

Matthew vs. Osborne, 13 *C. B. (J. Scott, 4)*, 919.

s. p., Doe vs. Wright, 10 *Adol. & E.*, 763.

Elliott vs. Eslava, 3 *Ala.*, 568.

Burdit vs. Burdit, 2 *A. K. Marsh. (Ky.)*, 143.

Lord vs. Bigelow, 8 *Vt.*, 445, 461. (Estoppel by deed.)

Contra, compare *Man vs. Drexel*, 2 *Pa. St.*, 202; *Smith vs. Elliott*, 9 *Barr (Pa. St.)*, 345; *Hall vs. Haun's Heirs*, 5 *Dana (Ky.)*, 55.

§ 1003. *Plaintiff's waiver of estoppel by not pleading when there was opportunity.*—At Common Law, and in those jurisdictions where under the New Procedure a plaintiff may interpose a replication or reply to new matter not constituting a counterclaim, the same rule applies against a plaintiff if the defendant has so pleaded the principal fact, and plaintiff has not availed himself of the opportunity to reply the estoppel.

Kinnersley vs. Orpe, 2 *Doug.* 517. (Trespass: plaintiff proved a former judgment. *Held*, error to direct verdict as if the judgment were conclusive; for it was not pleaded.)

So even where defendant pleads a former recovery in bar plaintiff cannot use it as an estoppel unless he replies that it is. Thus in *Brinsmaid vs. Mayo*, 9 *Vt.*, 31, an administrator sued for use and occupation, and defendant pleaded that plaintiff's intestate had no title; and also that plaintiff had already recovered the land in eject-

ment, with damages for rents and profits. Plaintiff replied that the recovery was not for the use and occupation profits now sued for. *Held*, that as he did not plead the former recovery as estopping defendant from denying his intestate's title, he could not have the benefit of such estoppel.

But see §§ 875-881, ESTOPPEL.

§ 1004. *What is "opportunity to plead" at Common Law.*—At Common Law the declaration could not anticipate and avoid a defence: hence the plaintiff never pleaded an estoppel unless defendant first alleged the principal fact; and then plaintiff replied the estoppel, not for the purpose of putting the adjudication or writing in evidence on the trial of the principal fact but for the purpose of getting the allegation of that fact struck out of the record on the ground that defendant was estopped to plead it.

Hence the phrase "opportunity to plead" an estoppel means that the adversary has first alleged the fact he is estopped to plead in such manner that the party relying on the adjudication, etc., can in the ordinary course of pleading, respond by setting up the adjudication as showing that he is estopped to plead such fact.

Thus if defendant's plea is the general issue,¹ even though accompanied with notice of special matter,² plaintiff has no opportunity to plead an estoppel.

To give plaintiff opportunity, defendant's plea must be sufficiently certain in respect to the fact, that a replication setting up the adjudication would as matter of law necessarily show an estoppel.³

¹ *Isaacs vs. Clark*, 12 *Vt.*, 692. (*Assumpsit* for use and occupation. Defendant pleaded general issue. Former judgment in evidence held conclusive, because no opportunity to reply it to the general issue.)

² *Perkins vs. Walker*, 19 *Vt.*, 144. Slander. Plea general issue, with notice of justification by evidence of truth of

words spoken. *Held*, to give plaintiff no "opportunity" to reply estoppel against proving their truth.)

Sprague vs. Waite, 19 *Pick.* (*Mass.*), 455. (Trespass: general issue: and statement of special matter filed. *Held*, that as special replications were abolished, plaintiff had no opportunity to plead a former adjudication; and being proved, it was conclusive.)

^a Thus if in trespass defendant pleads title in a third person under whom he claims, but without showing at what time such title accrued or was held, plaintiff has no "opportunity" to plead an estoppel by adjudication against the third person's claim of title; for lack of title, at the time of the adjudication and theretofore, would not negative title at a later time, because it might have been acquired since.

Shelton vs. Alcox, 11 *Conn.*, 240.

§ 1005. *The same—under New Procedure.*—In those jurisdictions where the usual Code rule is in force, that new matter not set up as counterclaim is in issue without reply,—if defendant has pleaded the principal fact as new matter in defence, plaintiff has no "opportunity" to reply; and the matter of estoppel given in evidence without being pleaded goes to the jury, with instructions that if they find it established it is conclusive against the defendant on the point in question.

Common practice. See also *Krekeler vs. Ritter*, 62 *N. Y.*, 372.

§ 1006. *Waiver of conclusiveness of technical estoppel.*—If an estoppel has not been pleaded, and, when proved, no objection is made to going into evidence on the principal fact, the conclusiveness of the estoppel is waived.

Hanson vs. Buckner's Execr., 4 *Dana* (*Ky.*), 251. (*So held* of a technical estoppel by deed; because estoppels are not favored, should not be allowed in doubtful cases, and, to be made available, must be taken advantage of in due time and in a legitimate mode,—i. e., by demurrer, where the estoppel appears in the record; by pleading

it specially when it does not, and by objecting to evidence when offered, where the party is estopped from proving the fact,—otherwise the estoppel is waived.)

§ 1007. *Estoppel proved by both parties.*—If matter raising an estoppel is shown by the combined evidence of both parties, the estoppel may be taken advantage of by one of them although neither has pleaded it.

Alderson vs. Marshall, 7 *Mont.*, 288; s. c., 16 *Pacif. Rep.*, 576. (Ejectment.)

[This was apparently an estoppel *in pais*; and at Common Law it was not necessary that such an estoppel be pleaded.]

§ 1008. *Estoppel proved may avail.*—Where the falsity of a representation made by plaintiff, on a point the truth of which is material to the defendant's case, is first brought out by evidence which is properly received under the issues, and which shows facts which estop plaintiff from taking advantage of its falsity, it is error not to give effect to the estoppel.

Bank vs. Flour Co., 41 *Ohio St.*, 552; s. c., 13 *Cinn. Weekly L. Bull.*, 368, 372.

See authorities on Evidence of equitable estoppel, §§ 878, etc.

Contra, *Eikenberry vs. Edwards*, 67 *Iowa*, 14; s. c., 24 *North West. Rep.*, 570. (Action on note: defence forgery. Evidence that defendant requested plaintiff to sue upon it, not available as an estoppel, because not pleaded. It was here held in effect that a defendant, who allows evidence of facts which are admissible under the issues to be received without objection, does not thereby enable the party adducing such evidence to claim that they estop him from his defence, if the estoppel was not pleaded.)

§ 1009. *Equitable regard to estoppel.*—The rules against giving effect to an equitable estoppel which has not been pleaded are necessarily subject to this qualification,—that a Court administering equitable principles

is not bound to give affirmative relief to a party who is not equitably entitled to it on the evidence.

§ 1010. *Illegality when available*.—Under the New Procedure, if the contract alleged and proved is not in itself illegal, plaintiff may recover, notwithstanding it appears by his own evidence,¹ or by evidence of the defendant² properly introduced for other purposes,³ that the contract arose out of an illegal transaction or was made for an illegal purpose.⁴

It is the better opinion, however, that where the contract itself is illegal, whether such illegality appear by plaintiff's own allegation or proof,⁵ or by evidence introduced by defendant under a denial, in order to show what the true contract was,⁶ plaintiff cannot recover, although illegality has not been pleaded as a defence.

¹ *Tuthill vs. Roberts*, 11 *N. Y. Weekly Dig.*, 35.

Fenwick vs. Laycock, 1 *G. & D.*, 27; s. c., 1 *Q. B.*, 414; *Clutterbuck vs. Coffin*, 1 *Dowl. (N. S.)*, 479.

[*Contra*, *Coppell vs. Hall*, 7 *Wall. (U. S.)*, 542. (Holding, in case of violation of laws against commercial intercourse with insurrectionary territory, that there can be no waiver. The defence is allowed, not for the sake of the defendant, but of the law itself. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the cause. Judgment reversed.) s. p., *Oscanyan vs. Arms Co.*, 103 *U. S.*, 261. (Corrupt public contracts: dismissal on plaintiff's opening.) Followed in *Lee vs. Johnson*, 116 *U. S.*, 48.]

² *Honegger vs. Wettstein*, 13 *Abb. N. C. (N. Y.)*, 393; s. c., 94 *N. Y.*, 252.

³ *Codd vs. Rathbone*, 19 *N. Y.*, 37. Followed in *Tuthill vs. Roberts*, 11 *N. Y. Weekly Dig.*, 35; citing also 54 *N. Y.*, 577.

⁴ *Bradford vs. Tinkham*, 6 *Gray (Mass.)*, 494. (Suit on check, shown to have been given for liquors.) *Musser vs. Adler*, 86 *Mo.*, 445. (Attorney's fees for services which were against public policy.)

s. p., *Cummins vs. Barkalow*, 1 *Abb. Ct. of App. Dec. (N. Y.)*, 479; *Potts vs. Sparrow*, 1 *Bing. N. C.*, 594; s. c.,

- 3 *Dowl.*, 630; *Goodwin vs. Mass. Mut. Life Ins. Co.*, 73 *N. Y.*, 48. (Wager policy.)
- Haywood vs. Jones*, 10 *Hun (N. Y.)*, 500. (Usury not pleaded, not available against an assignee suing on the note.)
- Marie vs. Garrison*, 13 *Abb. N. C. (N. Y.)*, 328, n. (Illegality in purchase of railroad at foreclosure.)
- Stoddart vs. Key*, 62 *How. Pr. (N. Y.)*, 137. (Illegal use of pretended partnership name in making the contract.)
- Vischer vs. Bagg*, 21 *N. Y. Weekly Dig.*, 399. (Wager contract in stock-broking.)
- Martin vs. Smith*, 4 *Bing. N. C.*, 436; s. c., 6 *Dowl.*, 639. (Wager on horse-race.)
- Reich vs. Bolch*, 68 *Iowa*, 526; s. c., 27 *North West. Rep.*, 507. (Work and labor on Sunday.)
- * *Cary vs. Western Union Tel. Co.*, 20 *Abb. N. C. (N. Y.)*, 333.
- McKee vs. Cheney*, 52 *How. Pr. (N. Y.)*, 144.
- Handy vs. St. Paul Globe Pub. Co.*, 41 *Minn.*, 188.
- * See § 813.
- In *Milbank vs. Jones*, 28 *N. Y. State Rep.*, 868; s. c., 5 *N. Y. Supp.*, 914, the complaint alleged the existence of a trust: the answer was a general denial. SEDGWICK, Ch. J., was of opinion that under an allegation of a trust intended to let in evidence to prove the existence of it, a denial let in evidence showing that no such trust could in fact exist. FREEDMAN, J., concurred in the result, because plaintiffs' evidence showed the illegality, but was of opinion that otherwise defendant, not having pleaded illegality, could not have availed himself of that defence.

§ 1011. *Variance*.—If illegality is pleaded, a different violation of law from that specified, although of the same essential nature, cannot avail.

Rice vs. Enwright, 119 *Mass.*, 187. (Action for rent: allegation that plaintiff knowingly let the premises to be used for illegal sale, etc., of liquor, not sustained by proof of knowingly permitting such use, after letting.)

§ 1012. *Laches, avails though not pleaded*.—Laches in delaying to sue, when it amounts to a defence, is available in Equity,¹ and under the New Procedure,² although not alleged or objected to in the answer.

- ¹ *Sullivan vs. Portland & K. R. Co.*, 94 *U. S.*, 806 (bill in equity); *s. p.*, *Credit Co. vs. Arkansas Cent. R. Co.*, 15 *Fed. Rep.*, 46; *Pratt vs. California Min. Co.*, 24 *id.*, 869. [*Compare Hall vs. Fullerton*, 69 *Ill.*, 448, laying down the contrary rule for all cases except where the bill attempts to excuse delay. To same effect, *School Trustees vs. Wright*, 12 *id.*, 432.]
- * *Kline vs. Vogel*, 90 *Mo.*, 239.
Costello vs. Mead, 55 *How. Pr. (N. Y.)*, 356.

§ 1013. *Statute of frauds*.—A defendant who has denied the making of the contract alleged can avail himself of the invalidity of the contract under the statute of frauds, even though he did not object to the admission of the evidence of such contract. The statute need not be pleaded unless a contract is admitted.

Trapnall vs. Brown, 19 *Ark.*, 39; *Wynn vs. Garland*, *id.*, 23.

Durant vs. Rogers, 71 *Ill.*, 121. (In equity.) [*Contra*, *Warren vs. Dickson*, 27 *Ill.*, 115; and *Chicago & W. Coal Co. vs. Liddell*, 69 *id.*, 639 (*assumpsit*); and *McClure vs. Otrich*, 118 *Ill.*, 320; *s. c.*, 8 *North East. Rep.*, 784, 6 *West Rep.*, 65.]

Billingslea vs. Ward, 33 *Md.*, 48.

Reid vs. Stevens, 120 *Mass.*, 209.

Fontaine vs. Bush, 40 *Minn.*, 141; *s. c.*, 41 *North West. Rep.*, 465.

Springer vs. Kleinsorge, 83 *Mo.*, 152, and *cas. cit.*

Duffy vs. O'Donovan, 46 *N. Y.*, 226; *Alger vs. Johnson*, 6 *N. Y. Supm. Ct. (T. & C.)*, 632; *mem. of s. c.*, 4 *Hun (N. Y.)*, 412; *Gibbs vs. Nash*, 4 *Barb. (N. Y.)*, 449; *Ontario B'k vs. Root*, 3 *Paige (N. Y.)*, 478.

Poag vs. Sandifer, 5 *Rich. (S. C.) Eq.*, 170.

Chickering vs. Brooks, 61 *Vt.*, 554; *s. c.*, 18 *Atl. Rep.*, 144, 146.

Whiting vs. Gould, 2 *Wisc.*, 552, 594.

Eastwood vs. Kenyon, 11 *Adol. & E.*, 438.

[*Contra*, *Bailey vs. Irwin*, 72 *Ala.*, 505.]

In Maine, a defendant who has not pleaded the statute, cannot object on instructions unless he objected to the evidence. *Lawrence vs. Chase*, 54 *Me.*, 196;—in which case he can: *Farwell vs. Tillson*, 76 *id.*, 227.

§ 1014. *Proper plaintiff*.—In Equity, and in equity

cases under the New Procedure, if, when the cause is tried and judgment asked, the proper plaintiff is before the Court, in the proper capacity, it is no objection that the action was not commenced in his name if the cause of action and the interest represented are the same.

Merwin vs. Richardson, 52 *Conn.*, 223, 234. (Suit commenced by beneficiaries on the refusal of the trustee to sue; but order making him plaintiff subsequently obtained.) *s. p.*, *Haddon vs. Lundy*, 59 *N. Y.*, 320.

§ 1015. *Infancy of plaintiff*.—Under the New Procedure which allows suit on a cause of action accrued to an infant to be brought in the infant's name, but requires appointment of a guardian *ad litem*, plaintiff's omission to prosecute by guardian is not jurisdictional, but a mere irregularity, which is waived unless set up in the answer, and is no cause for dismissing the complaint at the trial, for the Court may appoint *nunc pro tunc*.

Rima vs. Rossie Iron Works, 47 *Hun (N. Y.)*, 153. [Citing *Smart vs. Haring*, 14 *Hun (N. Y.)*, 276; *Sims vs. N. Y. College of Dentistry*, 35 *id.*, 344, and disapproving *Imhoff vs. Wurtz*, 9 *N. Y. Civ. Pro. R.*, 48.] The same rule was held under the old Code. *Rutter vs. Puckhofer*, 9 *Bosw. (N. Y.)*, 638; *Parks vs. Parks*, 19 *Abb. Pr. (N. Y.)*, 161; *Treadwell vs. Bruder*, 3 *E. D. Smith (N. Y.)*, 596; 1 *Wait's Pr.*, 486.

s. p., Under the English rules of pleading, 1 *Chitt. Pl.*, 16 *Am. ed.*, 554.

§ 1016. *Subrogation*.—Under an answer in an equitable action, setting up a right prior to that of plaintiff, the right being such that plaintiff is entitled to be subrogated thereto, plaintiff may, without reply, claim the right to subrogation at the trial.

Clark vs. Mackin, 95 *N. Y.*, 346, 352. (Foreclosure.)

§ 1017. *Rebuttal of cause of action proved but not*

alleged.—If evidence admitted, though without objection, to prove the cause of action alleged, fails to establish it, but establishes a different cause of action, it is error to give judgment upon such different cause of action without allowing the defendant the benefit of any defence shown by the evidence, although such defence was not pleaded.

Arnold vs. Angell, 62 *N. Y.*, 508; rev'g 38 *N. Y. Super. Ct. (J. & S.)*, 27. (Action to dissolve partnership and for accounting; proof of loan at excessive rate of interest. *Held*, error to give judgment for the loan, disregarding usury because not pleaded. CHURCH, Ch. J., says: "The defendant had no opportunity to plead it. An answer setting up usury would have been improper in the action brought. It would have constituted no defence to that action. If the action was to be tried upon the evidence, in disregard of the pleadings, the defendant should have had the benefit of any defence which the evidence disclosed. It would be manifestly unjust to permit a plaintiff to secure the benefit of a new cause of action not embraced in the pleadings, and refuse a defendant the corresponding benefit of a defence not thus disclosed.")

5. OMISSION TO PLEAD WAIVED BY NOT OBJECTING TO EVIDENCE.

§ 1018. Necessity of objection.†

§ 1019. Evidence admissible on several grounds.

§ 1018. *Necessity of objection*.—Whether failure to object to evidence when offered, or to move to strike it out as soon as its incompetency is disclosed, waives the objection, so as to preclude from insisting that it cannot be considered in instructions or findings, compare—

Affirmative—*Colrick vs. Swinburne*, 105 *N. Y.*, 503. (Special damages.)

Flaherty vs. Miller, 4 *N. Y. Supp.*, 618; s. c., 23 *N. Y. State Rep.*, 91. (Waiver of a stipulation in a contract.)

Hubbard *vs.* Russell, 24 *Barb.*, *N. Y.*, 404; Ward *vs.* Forrest, 20 *How. Pr.* (*N. Y.*), 465.

s. p., Coster *vs.* Mayor, etc., of Albany, 43 *N. Y.*, 399, rev'g in effect 52 *Barb.* (*N. Y.*), 276; Bryan *vs.* Baldwin, 52 *N. Y.*, 232, aff'g 7 *Lans.* (*N. Y.*), 174; Peck *vs.* Goodberlett, 109 *N. Y.*, 180; Knapp *vs.* Simon, 96 *N. Y.*, 284; s. c., 6 *N. Y. Civ. Pro. R.*, 1, 11, rev'g 49 *N. Y. Super. Ct.* (*J. & S.*), 17; Hutchinson *vs.* Market Bank of Troy, 48 *Barb.* (*N. Y.*), 302; Schlusell *vs.* Willett, 34 *id.*, 615; Rogers *vs.* Millard, 44 *Iowa*, 466.

Negative—Hollister *vs.* Englehart, 11 *Hun* (*N. Y.*), 446; Wyckoff *vs.* Taylor, 13 *Daly* (*N. Y.*), 564; s. c., 1 *N. Y. State Rep.*, 612.

Hamilton *vs.* N. Y. Central R. R. Co., 51 *N. Y.*, 100. (Omission to object to the introduction of evidence on the ground that it is irrelevant and immaterial is not a concession that it is competent. The Court say: "Counsel may deem certain evidence offered entirely irrelevant and immaterial, and therefore harmless, and for that reason raise no objection to its introduction, and thus avoid an exception, assuming . . . that, [the evidence] being in, it was the duty of the Court and jury to give it whatever effect it ought to have in the case.")

See also §§ 802, etc.

A variance of proof from the pleading, if no objection is taken at the trial, is waived if the case be one in which the trial court might have allowed an amendment had objection been made. Railroad Co. *vs.* Lindsay, 4 *Wall.* (*U. S.*), 650, 656.

§ 1019. *Evidence admissible on several grounds.*

Omission to object to the reception of evidence of matter not pleaded is not a waiver of the right to object to allowing instructions, or a finding thereon, if the evidence was admissible for any other purpose.

Arnold *vs.* Angell, 62 *N. Y.*, 508; rev'g 38 *N. Y. Super. Ct.* (*J. & S.*), 27.

Williams *vs.* Mechanics and Traders' Fire Ins. Co., 54 *N. Y.*, 577.

6. SWORN DENIALS AND EFFECT OF OMISSION.

[The effect of statutes and rules of court requiring verified denials of written instruments on particular facts, as modifying the issue, is under §§ 615, 636, DEFINING THE ISSUES. The actual production of evidence is under §§ 861, 871, RECEPTION OF EVIDENCE.]

§ 1020. Document denied under oath. § 1022. Conclusive admission.

1021. Sworn denial of instrument 1023. Statutory admission must control verdict and findings.
not evidence.

§ 1020. *Document denied under oath.*—Under statutes requiring a sworn denial of a written instrument which has been pleaded, in order to keep upon the pleader the burden of proving execution,¹—if a sworn denial has been interposed, the pleader does not discharge himself of the burden of proof by making a *prima facie* case which the judge holds sufficient to let the instrument in as evidence; but the burden remains upon him; and it is proper to instruct the jury that the burden is upon him to establish the instrument upon the whole evidence.² But for this purpose a preponderance of evidence is sufficient.³

The rule as to the requisite cogency of proof is not altered by the oath; and it is error to instruct the jury that the party who pleaded the instrument must prove the sworn denial false.⁴

¹ For the statutes, see § 615, p. 507, etc.

² *Carver vs. Carver*, 97 *Ind.*, 497.

Farmers and Merchants' Bank vs. Young, 36 *Iowa*, 44.
s. p., *Huddleston vs. Coyle*, 21 *La. Ann.*, 148.

³ *Wallace vs. Wallace*, 8 *Ill. App.*, 69. (Holding it error to instruct that there must be proof beyond a reasonable doubt by reason of a charge of forgery being involved.)

⁴ *Patrick vs. Carr*, 50 *Miss.*, 199.

§ 1021. *Sworn denial of instrument not evidence.*—Under the New Procedure or Common-law practice, if a sworn plea or answer, or an affidavit denying execution of a written instrument, interposed under the statute, forms part of the issue and has not been put in evidence, it is not error to instruct the jury that it is not in evidence, and that they have no right to consider it in determining the question of execution.

Hunter vs. Harris, 29 Ill. App., 200, 205.

§ 1022. *Conclusive admission.*—In those jurisdictions where the effect of omission to interpose a verified denial is to admit the execution of the instrument,¹ it is proper to instruct the jury that the admission is controlling upon them.²

¹ See table on p. 507.

² Clinton Nat. Bank vs. Torrey, 30 Iowa, 85.

Jenkinson vs. Monroe, 71 Mich., 630; s. c., 39 North West., 854.

§ 1023. *Statutory admission must control verdict and findings.*—If the execution of an instrument as pleaded has been admitted by failure to comply with a statute requiring denial to be under oath, it is error to leave the question to the jury, or to find the terms different from those alleged and admitted,¹ unless the admission has been waived.²

¹ Kelly vs. Kelly, 12 Tex., 452.

² Allison vs. Hubbell, 17 Ind., 559. (Waiver, by agreement of counsel, after general denial, that defendant might “give in evidence all matters of defence which might be proved under said denial, or under any other proper answer that might be pleaded herein; and that the plaintiff may give in evidence any matters proper to support the complaint or rebut the defence of the defendant which would be admissible under any proper reply,”—held a waiver.)

If the party failing to comply with the statute has been allowed without objection to adduce evidence in support of his unsworn denial, a verdict or finding in his favor upon the question should not be disturbed. *Crowley vs. City R. Co.*, 60 *Cal.*, 628.

[Under some statutes, going to trial without objection has been held a waiver.]

7. FACTS OCCURRED PENDING SUIT.

- § 1024. Facts in furtherance of the original cause of action. § 1026. Facts in amended instead of supplemental pleading.
1025. Additional instalments.

§ 1024. *Facts in furtherance of the original cause of action.*—Under a supplemental complaint, facts constituting a further development of the cause of action originally alleged, and entitling plaintiff to extended or varied relief, are available even though such facts are such as might have been used as the sole basis of an action.

Latham vs. Richards, 15 *Hun* (N. Y.), 129.

s. p., *Haddow vs. Lundy*, 59 *N. Y.*, 320.

Hipgrave vs. Case, *L. R.* 28, *Ch. D.*, 356; s. c., 54 *L. J. Ch.*, 399; 52 *L. T. R. N. S.*, 242.

§ 1025. *Additional instalments.*—Additional instalments of obligation falling due during the action cannot be recovered without amendment or supplemental pleading.¹

If the action is for principal due before its commencement, interest to the time of verdict, report, or decision may be had without supplemental or amended pleading.

If the action was for interest, principal falling due after its commencement cannot, against objection, be had without such pleading.²

¹ *Manhattan Sav'gs Bk. vs. Town of East Chester*, 44 *Hun* (N. Y.), 537.

s. p., *Hamlin vs. Race*, 78 *Ill.*, 422.

² *Malcolm vs. Allen*, 49 *N. Y.*, 448, 452, rev'g 5 *Alb. L. J.*, 334.

Foxell vs. Fletcher, 87 *N. Y.*, 476; s. c., 14 *Weekly Dig.*, 298.

§ 1026. *Facts in amended instead of supplemental pleading.*—Facts occurring after suit, proper to be set up by supplemental pleading, are available at the trial if set up by an amended pleading to which no objection was seasonably made on the ground that the pleading should have been supplemental.

Howard vs. Johnston, 82 *N. Y.*, 271. (Amendment of answer setting up over-payment. FOLGER, Ch. J., said: "When a supplemental answer has been allowed, put in, and the allegations of it proven, any judgment to which they entitle the defendant against the plaintiff should be rendered in the defendant's favor. We cannot regard the amendment of the answer in this case consented to by plaintiff, as other in effect than a supplemental answer allowed by the Court, with all the consequences as to right to prove and right to judgment flowing therefrom. The defendant was permitted to claim by amended answer that the plaintiff had been overpaid, and to ask judgment for the amount of over-payment. No greater latitude need have been allowed by a supplemental answer.")

Knickerbocker Life Ins. Co. vs. Nelson, 78 *N. Y.*, 137; s. c., 7 *Abb. N. C.*, 170, 180, 181.

S. P., *Puffer vs. Lucas*, 101 *N. C.*, 281; s. c., 7 *South East.*, 734. (Holding it too late to object at the trial for the first time that an agreement made with plaintiff as to the subject of controversy pending the suit, and his breach of it, was set up by answer, and was not stated as a counterclaim. If sufficient matter is pleaded, the law determines the character and effect of the pleading without regard to the particular name given it.)

8. CONFORMITY OF PROOFS TO ALLEGATIONS.

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|------------------------------------------------------------------------------------------|-----------------------------------------------------|
| § 1027. Success on the evidence limited by the pleadings. | § 1030. Representative capacity misdescribed. |
| 1028. Allegation of individual cause of action by plaintiff described as representative. | 1031. Counsel's practical construction of pleading. |
| 1029. Allegation of representative's cause of action and proof of individual cause. | 1032. Joint and several obligations. |
| | 1033. Omission to reply. |
| | 1034. Departure. |

§ 1027. *Success on the evidence, limited by the pleadings.*—In Equity,¹ and under the New Procedure,² a party, whether plaintiff³ or defendant,⁴ must prevail according to the case made by his pleading, or not at all; *secundum allegata* as well as *probata*.

But this rule is to be applied equitably, and does not preclude recovery on facts alleged, though inaccurately in detail.⁵

¹ *Rome Exchange Bank vs. Eames*, 5 *Abb. Ct. App. Dec.* (N. Y.), 83. (Creditor's action. The Court say: "No decree can be made in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some parts of the pleadings and evidence.")

"Proof without allegation is as ineffectual as allegation without proof." *Hunt vs. Daniel*, 6 *J. J. Marsh. (Ky.)*, 399, 404.

Reynolds vs. Morris, 7 *Ohio St.*, 315. (Resulting trust. Allegation that plaintiff paid all the consideration; proof of only part; total failure.)

Jeffrey vs. Flood, 70 *Md.*, 42; s. c., 19 *Md. L. J.*, 949; 16 *Atl.*, 444. (Bill to enjoin foreclosure by sale under power, on the ground that defendant refused to receive the balance due, claiming more; prayer for accounting, and offer to pay what was due. *Held*, error to give absolute injunction on proof of usury and overpayment. But bill amendable.)

² *Rome Exchange Bk. vs. Eames*, 4 *Abb. Ct. App. Dec.*, 83; *Wright vs. Delafield*, 25 *N. Y.*, 266.

San Marcial Land and Imp. Co. vs. Stapleton (*New Mex.*,

1887), 12 *Pacif. Rep.*, 621. (Bill to enjoin enforcement of power of sale on allegations that it was in violation of covenant, not sustainable on the sole ground that the power of sale was void.)

* *Southwick vs. First Nat'l Bank of Memphis*, 84 *N. Y.*, 420. (Where complaint charges defendant with a breach of a promise to apply the proceeds of a draft, defendant cannot be held liable upon the ground of a conversion of the draft, or that a mistake of facts induced its payment by plaintiff.)

Day vs. Town of New Lots, 107 *N. Y.*, 148. (Allegation of plaintiff's title to a fund in defendant's hand: proof that the fund was held for a third person, against whose interest plaintiff had an equitable claim.)

Arnold vs. Angell, 62 *N. Y.*, 508. (Under an allegation of partnership, and prayer for dissolution and accounting, it is error, on failure to prove the partnership, to give judgment for the money put into the business, as a loan upon interest.)

Compare White vs. Gaines, 25 *N. Y. Weekly Dig.*, 361. (Holding that although plaintiff alleged that he was entitled to share in profits as a partner, recovery for work and labor payable by a share in the profits was allowable, as the allegations were sufficient, disregarding the allegations of partnership; and *Marsh vs. Masterson*, 101 *N. Y.*, 401.)

[For other contrasted cases, see note 5.]

* *Wright vs. Delafield*, 25 *N. Y.*, 266. (Action to restrain suit on notes. *Held*, error to give defendant affirmative relief not within the answer.)

Hall vs. U. S. Reflector Co., 30 *Hun (N. Y.)*, 375. (Reversing judgment because rendered on a defence unpleaded.)

Field vs. Mayor, etc., of N. Y., 6 *N. Y.*, 179 (payment not pleaded not available without amendment); *s. p.*, *Seward vs. Torrence*, 5 *N. Y. Supm. Ct. (T. & C.)*, 323; *mem.*; *s. c.*, 3 *Hun (N. Y.)*, 220.

Smith vs. Owens, 21 *Cal.*, 11. (Fraud no defence because not pleaded.)

But defendant is entitled to such benefit as the facts pleaded and proved by him entitle him to by law, irrespective of whether he has rightly called it in his answer a defence or a recoupment. *Springer vs. Dwyer*, 50 *N. Y.*, 19.

For other contrasted cases, see note 5.

* *Crawford vs. Moore*, (*U. S. C. Ct. W. D. Mich.*), 28 *Fed. Rep.*, 827. (Bill to compel conveyance of land to the

heirs of the person who furnished the purchase-money. The Court say : The rule that proof and the pleading must correspond is a familiar one, but it is to be applied equitably and not rigidly, especially when it is appealed to on behalf of a party having at all the time of the progress of the cause the facts in full possession, and therefore not misled by the pleading, which, although inaccurate or mistaken as to some of the details, yet contains averments sufficient to support a claim for the relief prayed for.)

For further illustrations of the rule in the text, see—

Express obligation; and implied.

Ritter *vs.* Galitzenstein, 13 *Daly* (N. Y.), 452. (Under a complaint alleging breach of an express partnership agreement not to indorse the firm's name, plaintiff cannot recover by force of the general rule of law which prohibits a partner from indorsing in the firm's name accommodation paper.)

Louisville, etc., Ry. Co. *vs.* Godman, 104 *Ind.*, 490 ; s. c., 4 *North East. Rep.*, 163. (Under an allegation of refusal to receive and carry as agreed, recovery cannot be had for neglect as common carrier to furnish proper appliances.)

Hempstead *vs.* N. Y. C. R. R. Co., 28 *Barb.* (N. Y.), 485. (If a complaint charges defendants only as carriers, and the proof shows they were forwarders, the case must fail. Cited by Prof. Dwight as illustrating the true rule, in *Place vs. Minster*, 65 *N. Y.*, 89, 102.)

Obligation alleged ; and recovery on original consideration.

Jones *vs.* Sparks, 1 *N. Y. State Rep.*, 476. (Action on note ; recovery on the original consideration allowed against a technical objection as to the manner of presentment.)

[*Contra*, *Housee vs. Phinney*, 20 *Hun* (N. Y.), 153. Recovery on the original consideration not allowed, where the note was void for usury.]

Tort, with contract as matter of inducement alleged ; and no proof of tort.

Ross *vs.* Mather, 51 *N. Y.*, 108. (Complaint alleged in substance a sale of a horse to plaintiff, which the defendant warranted and falsely represented to be in a certain condition ; that, relying on such representation, plaintiff purchased the horse ; that in fact the horse was diseased, and not in the condition represented, which the plaintiff well knew. *Held*, that the gravamen of the action was fraud, and plaintiff could not recover on proof of warranty only.)

Degraw *vs.* Elmore, 50 *N. Y.*, 1. (Action to recover the purchase-money of certain stock, which defendant had

by fraudulent representations induced plaintiff to buy. The evidence showed that stock was received in payment of a precedent debt. *Held*, that the plaintiff could not recover the amount of the debt in this action.)

King vs. McKellar, 94 *N. Y.*, 317. (Under a complaint alleging that defendant converted money intrusted to him, recovery cannot be had although it appears that defendant negligently took insufficient security, but had invested the money in good faith.)

Lockwood vs. House, 101 *N. Y.*, 647. (Replevin for deed: recovery in specific performance not allowable.)

People vs. Denison, 19 *Hun (N. Y.)*, 137, *aff'd* in 80 *N. Y.*, 656. (Complaint by the people alleged that defendants without right, by means of frauds, devices, false pretences and vouchers, and corrupt combinations with the State officers, had obtained moneys owned by and belonging to the State to the sum of \$417,571. *Held*, that, fraud not having been proved, the action could not be retained as one of implied contract growing out of the duty of the defendant to refund money which had been unlawfully paid him.)

Beach vs. Eager, 3 *Hun (N. Y.)*, 610. (Complaint alleged a cause of action arising from fraudulent representations as to the defendant's power to sell a mortgage. *Held*, error to charge that plaintiff was entitled to recover if the employment was not within the scope of defendant's agency.)

Sumner vs. Rogers, 90 *Mo.*, 324, and *cas. cit.* (Counts for fraud in inducing discharge of a note: error to allow recovery on the note without proof of fraud.)

Contract with tortious breach alleged; and no proof of tort.

On proof of facts alleged and raising implied contract, plaintiff may recover without proving additional allegations of tort. *Connaughty vs. Nichols*, 42 *N. Y.*, 83. (Money received coupled with allegations of conversion.) *s. p.*, *Sheahan vs. Shanahan*, 5 *Hun (N. Y.)*, 461; *Gordon vs. Hostetter*, 37 *N. Y.*, 105; *Byxbie vs. Wood*, 24 *id.*, 607; *Greentree vs. Rosenstock*, 61 *id.*, 583.

Compare Barnes vs. Quigley, 59 *N. Y.*, 265. (Here the complaint alleged that plaintiff was induced by fraud to give up to defendant his promissory note for an insufficient consideration. *Held*, that plaintiff could not recover as for balance unpaid upon the note. The Court say: "It was error in the Court to change the form of action by striking out or treating as surplusage the principal allegations, those which characterize

and give form to the action, because perchance there may be facts stated by way of inducement spelled out which would when put in proper form have sustained an action of *assumpsit*.”)

Beard *vs.* Yates, 2 *Hun* (N. Y.), 466. (Complaint alleged breach of covenant granting water privileges to a mill. Held, error to allow plaintiff on failing to prove any covenant, to recover for a tortious interference with his rights.)

Pitt *vs.* Wilkinson, 24 *N. Y. Weekly Dig.*, 43. (Allegation of sale: recovery on proof of no sale, but deprivation of property by fraud of a third person, not allowable.)

Sherman *vs.* Johnson, 56 *Barb.* (N. Y.), 59. (Although the complaint alleges that defendant's statements in reference to an account or claim sold to him by defendant were false and fraudulent, still recovery may be had without showing fraud if enough is proved to sustain an implied warranty.)

[For other authorities see § 970.]

Nealis *vs.* Lissner, 52 *Hun*, 503; s. c., 5 *N. Y. Supp.*, 682. (Allegations that the defendants unlawfully and fraudulently failed to perform, are redundant, and the allegations of fraud stricken out on motion.)

Contract with tort inducing it alleged, and no proof of tort.

Sparman *vs.* Keim, 83 *N. Y.*, 245; s. c., 9 *Abb. N. C.*, 1. (Holding plaintiff might recover back money invested in a partnership on the ground that he was an infant, without proving his allegations that he was induced by fraud to enter into the partnership.)

Graves *vs.* Waite, 59 *N. Y.*, 156. (Where the gravamen of an action is contract, allegations of fraud inducing the entering into the contract, and a demand for damages resulting therefrom, in addition to the sum to which the plaintiff was entitled under the contract, are wholly irrelevant, and such fraud need not and cannot be proved.)

s. p., Ledwich *vs.* McKim, 53 *N. Y.*, 307. (Holding that the whole frame of the complaint must be considered.)

s. p., Ross *vs.* Terry, 63 *N. Y.*, 613.

Lindsay *vs.* Mulqueen, 26 *Hun* (N. Y.), 485. (Fraudulent representations where warranty is alleged.)

s. p., Quintard *vs.* Newton, 5 *Robt.* (N. Y.), 72; Fowler *vs.* Abrams, 3 *E. D. Smith* (N. Y.), 1.

Wilful wrong alleged; and mere negligence proved.

It is the better opinion that where negligence is otherwise appropriately pleaded, the mere addition of such epithets as “wilfully,” “maliciously,” or the like, do not prevent recovery on proof of unintentional negligence.

Louisville, N. A. & C. R. Co. *vs.* Wood, 113 *Ind.*, 544; s. c., 14 *North East. Rep.*, 572; 12 *West. Rep.*, 303. (Allegation that conductor's hurrying plaintiff off the train was done wilfully.)

McCord *vs.* High, 24 *Iowa*, 336. (Allegation that negligent acts were wilful and malicious.)

Claxton's Ad'm *vs.* Lexington & Big Sandy R. R. Co., 13 *Bush (Ky.)*, 636. (Where under a statute (*Ky. Gen. Stat.*, 57, §§ 1, 3) the plaintiff seeks to recover punitive damages for wilful neglect, he may nevertheless on the proof of culpable negligence recover compensatory damages. Allegations of wilful neglect include all inferior degrees of negligence under the statute.)

Taylor *vs.* Holman, 45 *Mo.*, 371. (Breaking plaintiff's mill, alleged to be caused by defendant's "wilful negligence." *Held*, error to instruct to find for defendant unless the injury was caused by wilful negligence.)

Conway *vs.* Reed, 66 *Mo.*, 346. (Allegation of "unlawful and wrongful" shooting. Evidence of a negligent shooting sufficient to sustain verdict for plaintiff.)

s. p., Robinson *vs.* Wheeler, 25 *N. Y.*, 252. (Suit against plaintiff's tenant for waste. Plaintiff alleged that defendant "wrongfully" set fire to a wood-shed. *Held*, no error to charge that plaintiff could recover for the wood-shed on proof merely of negligent burning. "It was the same kind of waste, the complaint averring that it was committed wrongfully, and the proof showing that it was done negligently.")

An allegation of "fault" sustains recovery for negligence. School Dist. in Medfield *vs.* Boston, H. & E. R., 102 *Mass.*, 552.

If, however, the gravamen of the charge is of a wilful or malicious injury, it cannot be sustained by proof of mere negligence, though gross.

C., B. & Q. R. R. Co. *vs.* Dickson, 88 *Ill.*, 431. (Declaration alleged that the defendant's servants caused a whistle of a locomotive to be sounded needlessly and recklessly, wilfully, wantonly, and maliciously. *Held*, that no recovery could be had for mere negligence, but the proof must show the sounding of the whistle in the manner charged.)

Indiana, Bloomington & W. R. Co. *vs.* Burdge, 94 *Ind.*, 46. (Action by a passenger for injuries from being thrown from a train. Complaint alleged that defendant's engineer, "in a wilful, reckless, careless, and unlawful manner, let on such a volume of steam to the engine as caused said train to jump and jerk into immediate movement at a very high and unlawful rate of speed in said

city," whereby the plaintiff was injured. *Held*, under such complaint, recovery could be had without allegation or proof of want of contributory negligence, but the injury must be proved to have been wilful.)

- s. p., *Panton vs. Holland*, 17 *Johns. (N. Y.)*, 92. (Allegation that defendant "maliciously intending" to injure plaintiff, dug up the soil contiguous to plaintiff's mesuage, and that from such loss of soil plaintiff's foundation-wall fell down. *Held*, proper to refuse a nonsuit moved for on the ground that no malice was shown. The words "maliciously intending" could be rejected as surplusage, though it would be otherwise of an allegation that he maliciously dug up the ground.)

Wrongful taking; and detention.

Hopkins vs. Davidson, 52 *N. Y. Super. Ct.*, 529. (Complaint alleging unlawful taking is not sustained by proof that defendant came lawfully into possession of the property, but unlawfully detained it.)

Dean vs. Yates, 22 *Ohio St.*, 388. (Under allegations charging that defendant by means of fraud obtained plaintiff's goods, a recovery cannot be had on proof that he was a *bona-fide* purchaser from a third person who had no title.)

Different modes of injury.

Pixley vs. Clark, 32 *Barb.*, 268; s. c., 35 *N. Y.*, 520. (Allegation of damages caused by turning water upon land. The proof was interference with the drainage of the land, which prevented the water naturally there from flowing off. This deviation was held to be a failure of proof in the lower court, but its decision was reversed on appeal.)

Commenting on this case, Professor Dwight, Com'r, says, in *Place vs. Minster*, 65 *N. Y.*, 89: "The substance of the charge was, that, through the act of the defendant, water was doing injury to the defendant's lawn. The variation in the proof was as to the mode of accomplishing the result, and that was immaterial, unless shown by statute [*i.e.*, according to the statute] to be material."

Allegation of fraud, not sustained by proof of mistake.

McMichael vs. Kilmer, 76 *N. Y.*, 36, rev'g 12 *Hun (N. Y.)*, 336. (Complaint for fraud in settlement of an account; recovery cannot be had on proof of mutual mistake.)

Dudley vs. Scranton, 57 *N. Y.*, 424. (Under a counterclaim charging fraudulent concealment in making a

settlement, Court properly refused to submit to the jury whether certain items were omitted by mistake.)
Belden vs. State, 103 *N. Y.*, 18 (holding therefore that judgment against plaintiff in an action for fraud was not conclusive as to the amount which was actually due and ought to have been paid when drawn in question in an action for mistake).

[Otherwise where defendant alleged mistake and asked reformation, so that both parties claimed that their minds had not met. **Crowe vs. Lewin**, 95 *N. Y.*, 423, aff'g 16 *Weekly Dig.*, 550.]

[Otherwise perhaps also of an allegation of mistake and proof, without objection, of fraud. See **Sweezy vs. Collins**, 36 *Iowa*, 589.]

In **Russell vs. Brownell**, 20 *N. Y. Weekly Dig.*, 504, equitable relief on the ground of mistake was granted where the count for mistake was not dependent upon the allegation of fraud.

Different grounds for same equitable relief.

Tufts vs. Tufts, 123 *U. S.*, 76; s. c., 31 *Law. ed.*, 91; 8 *Supm. Ct. Rep.*, 54. (Holding that a bill for relief on ground of fraud is sustainable if the facts found are not materially and substantially different from those alleged.)

Voorhees vs. Bonesteel, 16 *Wall.*, 16, aff'g 7 *Blatchf.*, 495. (Bill by assignee in bankruptcy to recover from bankrupt's wife property alleged to be held for her husband, not sustainable by proof that she took in fraud of his creditors.)

Levy vs. Chittenden, 120 *Ind.*, 37; 22 *North East. Rep.*, 92. (Creditor's action to set aside mortgage for fraud not sustainable by proof of payment; amendment alleging as a further ground, that the mortgagors had been allowed to retain possession and disposal, allowable to conform the pleading to the proof.)

Mayer vs. Feig, 114 *Ind.*, 577; s. c., 17 *North East Rep.*, 159; 14 *West.*, 813. (Creditor's action to set aside mortgage on the ground of actual intent to defraud creditors, not sustainable on proof of a subsequent agreement making the mortgage a trust for the mortgagor.)

Third National Bank of Buffalo vs. Cornes, 2 *N. Y. State Rep.*, 543. (Complaint to set aside a conveyance for fraud on creditors cannot be sustained by proof that the conveyance was a trust for the benefit of grantor beyond the cost of his support and as to the surplus, liable to creditors.)

Fuller Electrical Co. vs. Lewis, 101 *N. Y.*, 674; s. c., more

fully, 4 *East. Rep.*, 401. (Creditor's action, on an allegation that a conveyance of his debtor, absolute on its face, was in fact a mortgage, cannot be sustained as an action to set aside an absolute conveyance on the ground of a fraud.)

Clough vs. Adams, 71 *Iowa*, 17; s. c., 32 *North West. Rep.*, 10. (Bill to rescind conveyance, for fraud, undue influence, and grossly inadequate consideration,—amendable after close of evidence and during argument, so as to allege mental weakness and financial distress.)

Howell vs. Sebring, 14 *N. J. Eq.*, 84. (Bill to set aside purchase by defendant for fraud and collusion; proof that defendant purchased for plaintiff's benefit; bill not sustainable without amendment.)

Bender vs. Bender, 14 *Oreg.*, 353; s. c., 12 *Pacif. Rep.*, 713. (Action by wife to rescind a sale upon the ground of undue influence: not sustainable by proof that the property was purchased with their joint earnings, and deeded to the husband without consideration.)

Fisher vs. Bishop, 16 *N. Y. Weekly Dig.*, 194. (Action to cancel mortgage for duress: not sustainable on proof of want of consideration.)

Johnson vs. Stone, 35 *Hun (N. Y.)*, 380. (Complaint alleged the sale of worthless mining stock to a lunatic. *Held*, that the action might be maintained as an action in equity for the purpose of avoiding the sale (it being obviously so framed), without proof of fraud, although defendant's acts were alleged to be wrongful and unlawful.)

[*Compare Durand vs. Hankerson*, 39 *N. Y.*, 287, holding that in a creditor's action to set aside a conveyance for fraud, grantee may be decreed to pay the purchase-money mortgage to receiver, although no fraud is shown.]

Eyre vs. Potter, 15 *How. (U. S.)*, 42. (Under a bill for relief against alleged actual and intentional fraud, relief cannot be granted on the ground of constructive fraud, even though incidentally indicated by the allegations charging actual fraud.)

[*Contra*, *Rickett's Appeal (Pa., 1888)*, 11 *Centr. Rep.*, 43. (Bill by devisee, etc., against trustee, to set aside purchase by the latter on a fraudulent judgment.) *Compare Bailor vs. Daly*, 7 *Mackey (D. C.)*, 175; s. c., 17 *Wash. L. Rep.*, 294, holding that failure to prove actual fraud alleged as a ground for impeaching a judicial sale will not prevent considering other allegations of such serious irregularities as to show that there was no legal sale.]

- Priest vs. Way*, 87 *Mo.*, 16. (Complaint charging fraudulent abstraction of funds of the deceased : error to sustain on proof merely that defendant procured a gift from deceased by the exercise of undue influence.)
- Marsh vs. McNair*, 99 *N. Y.*, 174, 178, 180. (Under an allegation that an instrument was made with intent merely to create a collateral security, and asking reformation accordingly, a recovery without reformation, on proof that its execution was induced by fraud or mistake not alleged, cannot be had.)
- s. P., *Bruce vs. Burr*, 67 *N. Y.*, 237. (Fraud alleged ; mistake proved.)
- Dalton vs. Leahey*, 80 *Cal.*, 446 ; s. c., 22 *Pacific Rep.*, 283. (Where action is to redeem from an absolute deed, on the ground that it was in fact a mortgage, judgment cannot be sustained by evidence of an absolute sale and agreement for reconveyance on repayment.)
- Vail vs. Long Island R. R. Co.*, 105 *N. Y.*, 283. (Action to restrain the use by a railroad of land of which plaintiff claimed to be owner, cannot be sustained by proof that plaintiff's interest in the land was that of an abutting owner on a public highway.)
- Benedict vs. Seventh Ward Railway*, 51 *Hun (N. Y.)*, 111. (Action to enjoin a street railway on the ground that it had not obtained the consent of property-owners, cannot be sustained on the ground that defendant was a trespasser upon land in the street in which plaintiff had an interest as abutting owner.)

§ 1028. *Allegation of individual cause of action by plaintiff described as representative.*—Under a complaint stating a cause of action on which plaintiff appears to be entitled to recover in his individual capacity, he may recover in that capacity, notwithstanding the action is entitled as brought by him as executor or as administrator,¹ trustee, or in other representative capacity, even if, by reason of the appointment being foreign, the action could not be sustained in that capacity.²

- Bingham vs. Marine Nat. Bank N. Y.*, 112 *N. Y.*, 661 ; s. c., 20 *State Rep.*, 292 ; *Wick vs. Jewett*, 9 *N. Y. State Rep.*, 477 ; s. P., *Litchfield vs. Flint*, 104 *N. Y.*, 543 ; s. c., 7 *Centr. Rep.*, 41 ; 11 *North East. Rep.*, 58 (on demurrer) ; s. P., *Murray vs. Church*, 1 *Hun*, 49 ; s. c., 3 *Sup'm Ct.*

(*T. & C.*), 145; affirmed on this opinion in 58 *N. Y.*, 621.

Amendment before trial allowable. *Nat. Benefit Ass. vs. Jackson*, 114 *Ill.*, 533; s. c., 1 *Western Rep.*, 600; s. c., 2 *North East. Rep.*, 414.

* *Newberry vs. Robinson* (*S. D. N. Y.*), 36 *Fed. Rep.*, 841. (Description of plaintiff as an administratrix, being mere *descriptio personæ*, may be disregarded as surplusage, on demurrer, where the right of action is one on which she can sue as an individual.)

s. p., *Spooner vs. Delaware, L. & W. R. Co.*, 115 *N. Y.*, 22, 30; s. c., 23 *State Rep.*, 554.

§ 1029. *Allegation of representative's cause of action, and proof of individual cause.*—If a plaintiff suing in a representative capacity alleges a cause of action upon which he ought to recover in his representative capacity, he cannot recover on proof of a cause of action belonging to him in his individual capacity.

Stokes vs. Riley, 121 *Ill.*, 166; s. c., 9 *West.*, 522; 11 *N. East.*, 877. (In equity.)

Mowry vs. Hawkins, 57 *Conn.*, 453, 458. (*Dictum* that one suing as a trustee must show his right to recover as such.)

In an action brought by plaintiff in his individual capacity to charge not a wrongdoer, but to establish an equity against one in rightful possession, plaintiff cannot prevail on proving that he claims as trustee for third persons. *McColl vs. Fraser*, 40 *Hun (N. Y.)*, 111, 114.

But evidence that the cause of action is one for which the plaintiff may be required to account in a representative capacity, though such evidence be adduced by himself, will not preclude recovery under a complaint in his individual capacity, if the cause of action be such as he has the right to sue upon in either capacity. *Davis vs. Carpenter*, 12 *How. Pr. (N. Y.)*, 27; *Thomas vs. Bennett*, 56 *Barb. (N. Y.)*, 197; *Merritt vs. Seaman*, 6 *N. Y.*, 168.

In an action of such nature, plaintiff may recover although defendant establishes a sufficient defence against the plaintiff in the capacity in which he might have brought but did not bring the action. *Scranton vs. Farmers'*,

etc., Bank, 33 *Barb.* (N. Y.), 527. (Holding that stating an indebtedness to pay, as executor, etc., for moneys deposited by him as executor, etc., and demanding "judgment as such executor," sufficiently showed that plaintiff sued as such; and that a defence that the money was his individual money, and had been paid to an execution creditor of his, was not available. Affirmed on the merits in 24 N. Y., 424.)

- s. p., but *contra* to last case as to what allegation is sufficient to show the capacity in which the action was brought. *Worden vs. Worthington*, 2 *Barb.*, 368. (Sustaining, on demurrer to replication, the defence of limitations, which would not have been appropriate if the action were in representative capacity. *So held*, although the declaration concluded "to the damage of plaintiffs as administrators.")

§ 1030. *Representative capacity misdescribed*.—A mistake in describing the representative capacity of the plaintiff or the defendant—such as alleging that he is executor instead of administrator with the will annexed,¹ or instead of trustee²—is amendable at the trial.³

¹ *Risley vs. Wightman*, 13 *Hun*, 163.

² *Ducker vs. Rapp*, 67 N. Y., 464.

³ In *McElwain vs. Corning*, 12 *Abb. Pr.*, 16, an amendment to correct the misstatement that defendants were sued as executors of B instead of as executors of A was allowed, on special motion, in order to save the statute of limitations. But compare *Davis vs. N. Y., Lake Erie & W. R. Co.*, 110 N. Y., 646; s. c., 15 *Civ. Pro. R.*, 62; *Shaw vs. Cock*, 19 *Hun* (N. Y.), 473, *aff'd* in 78 N. Y., 194, against allowing amendment to elude the statute of limitations.

§ 1031. *Counsel's practical construction of pleading*.—If the form or contents of the complaint are not conclusive as to whether a plaintiff or a defendant is made such in his individual or his representative capacity, and counsel have concurred in trying the cause on either theory exclusively, it is too late at the close of the evi-

dence for either to shift ground, and claim that the other construction controls the judgment.

Fritz *vs.* McGill, 31 *Minn.*, 536.

Bennett *vs.* Whitney, 94 *N. Y.*, 302.

Fortier *vs.* New Orleans Bank, 112 *U. S.*, 439.

§ 1032. *Joint and several obligations.*—Under the New Procedure, unless the variance has caused prejudicial surprise, or affects the mode of trial, against objection, separate judgment may be had in favor of one of two plaintiffs who shows a right to recover on the facts alleged, and against the other who fails to do so.¹

So also against one or more² of two defendants sued on a joint or joint and several obligation, if he or they are proved to be alone liable on the contract alleged, and in favor of the other who is not.³

¹ Simar *vs.* Canaday, 53 *N. Y.*, 298; s. p., Quinn *vs.* Martin, 54 *id.*, 660.

² Field *vs.* Van Cott, 15 *Abb. Pr. N. S. (N. Y.)*, 349; s. c., 5 *Daly*, 308.

³ Brumskill *vs.* James, 11 *N. Y.*, 294. (Action on alleged firm note: recovery against one [a husband] who signed it in firm name, and in favor of the other [his wife], sustained.)

Stedeker *vs.* Bernard, 102 *N. Y.*, 329. (Allegation of partnership note: judgment against one of the firm sustained.) s. p., § 944.

Harrington *vs.* Higham, 15 *Barb. (N. Y.)*, 525. (Action against alleged partners on an award: judgment against those only who consented to the submission, sustained.)

McIntosh *vs.* Ensign, 28 *N. Y.*, 169. (Action against carriers.)

Fielden *vs.* Lahens, 6 *Abb. Pr. N. S.*, 341. (Negotiable paper.)

s. p., Herrington *vs.* Robertson, 71 *N. Y.*, 280, aff'g 7 *Hun*, 368. (Action against executor for money, and against devisee to charge land with lien therefor. Judgment against the executor alone, sustained.)

The rule that in an action for tort the jury may find

against one defendant and in favor of another, does not apply where such defendants answer jointly, making an admission which supplies the lack of evidence. *Murphy vs. Kron*, 20 *Abb. N. C.*, 259. (Assault and false imprisonment.)

§ 1033. *Omission to reply*.—Where a reply or replication is required, proceeding through the trial as if one had been put in is a waiver of its omission, and it is not error to decide or instruct as if there had been a formal reply or replication.

Meador vs. Malcolm, 78 *Mo.*, 550.
Muldoon vs. Blackwell, 84 *N. Y.*, 646.

§ 1034. *Departure*.—A reply or replication making a different case from that alleged in the complaint or bill will not avail to sustain the case on failure to establish the claim alleged in the bill.

Vattier vs. Hinde, 7 *Pet.*, 252, 274, rev'g 1 *McLean*, 110, and holding that the English Chancery practice applies, and a departure is not allowable in replication, but the bill should be amended.

9. CONFORMITY OF FINDINGS TO THE ISSUE AND ADMISSIONS.

§ 1035. Findings controlled by admission.

§ 1036. Waiver of admission by going into evidence

§ 1035. *Findings controlled by admission*.—A party has a right to object to any finding being made contrary to an admission in pleading which he has not waived.

Walker vs. Brem, 67 *Cal.*, 599; s. c., 8 *Pac. Rep.*, 320. If findings are made on matters covered by admission they must conform to the admission.)

Hall vs. Polack, 42 *Cal.*, 218.

Carter vs. McCormick, 4 *Col.*, 196. (Newly discovered evi-

dence contrary to a fact admitted is not ground for a new trial.)

Fitzgerald vs. Barker, 85 *Mo.*, 13. (Error to instruct contrary to an admission.)

Dunham vs. Cudlipp, 94 *N. Y.*, 130.

Bonn vs. Steiger, 21 *Hun* (*N. Y.*), 219.

Fiske vs. Bailey, 51 *N. Y.*, 150, 154. (Allegation in answer, that plaintiff was unlawfully on defendant's premises,—*Held*, an admission of ownership; and the jury had no right to find against this admission on the record.)

Oliver vs. Moore, 23 *O. S.*, 473. (Holding it error to disregard admission when no evidence was given to controvert it.)

Wilcox vs. Servant, etc., 2 *Mod.*, 6. (Admission in pleading overrides contrary finding in special verdict.)

§ 1036. *Waiver of admission by going into evidence.*—

A party whose allegation is admitted by his adversary's pleading does not, as matter of law, necessarily exonerate the adversary from the conclusive effect of the admission, either by adducing evidence himself to the contrary of it, or by allowing the adversary to adduce evidence in support of the admitted allegation. Notwithstanding such unresisted reception of evidence, the Court may hold the parties to the trial of the issues which they have presented in the pleadings, and treat the admission as conclusive; and may find the fact, or may direct a nonsuit or a verdict, in accordance with the admission, notwithstanding the insufficiency of the evidence which has been given in the attempt to establish the fact admitted,¹ or the cogency of evidence which has been received without objection contrary to the admission.²

But the Court has discretionary power to treat the admission as waived, and to find, or to give instructions to the jury in view of the evidence.³

¹ *Potter vs. Smith*, 70 *N. Y.*, 299. (Trespass: admission of title and possession.)

Jones vs. Morehead, 1 *Wall.* (*U. S.*), 155, 165, (holding that though the evidence showed no infringement,

yet as the answer admitted infringement, decree against defendant was right; but as the extent of the infringement was not distinctly admitted, the admission must be construed as narrowly as possible, and the decree reduced accordingly. MILLER, J., in delivering the judgment of the Court, says: "An effort has been made by counsel to show that this admission has been waived by the act of plaintiffs in going into the proofs, and otherwise treating it as an open question. But this would violate a principle of universal application both in proceedings at Common Law and in chancery, to wit, that the proofs must correspond with the allegations. It would be subversive of all sound justice, and tend largely to defeat the ends of justice, if the Court should refuse to accept a fact as settled, which is distinctly alleged in the bill and admitted in the answer.")

• *Darling vs. Brewster*, 55 *N. Y.*, 667. (Holding that admission by failure to answer is not waived by plaintiff's offering evidence on applying for judgment, nor by allowing, without objection, evidence to be adduced by defendant.)

Paige vs. Willett, 38 *N. Y.*, 28. (Common Law action. *Held*, that it was not error to find in accordance with the admissions, disregarding the evidence to the contrary; with *dictum* that this is the only proper course.)

Krom vs. Levy, 6 *N. Y. Supm. Ct. (T. & C.)*, 253. (Recoupment disallowed because not pleaded, although evidence in support of such defence or counterclaim had been received without objection.)

• *Bryan vs. Baldwin*, 52 *N. Y.*, 232, 234. (So holding, because if objection had been made amendment might have been asked.)

Ely vs. Cook, 2 *Hill.*, 406; s. c., 9 *Abb. Pr.*, 366, [aff'd, without passing on this point, in 28 *N. Y.*, 365].

Randolph vs. Mayor, etc., of N. Y., 53 *How. Pr.*, 68, 76.

Mensch vs. Mensch, 2 *Lans. (N. Y.)*, 235. (Action for annuity; complaint alleging that no payment had been made. *Held*, that plaintiff's proof of a payment made having been received without objection, the Court could treat the payment as taking the case out of the statute of limitations, which was pleaded by defendant, it not appearing that defendant was misled.)

Case vs. Pharis, 106 *N. Y.*, 114, 118. (An admission in pleading is not conclusive in such sense, that if not brought to the attention of the trial court a disregard of it will be ground of reversal. So holding of an admission in a bill of particulars.) s. p., *Stilwell vs. Carpenter*, 2 *Abb. N. C.*, 238, 268; mem. s. c., 62 *N. Y.*,

639 ; modifying 59 *N. Y.*, 414, which rev'd 1 *Supm. Ct. (T. & C.)*, 615.

In *Schreyer vs. Mayor, etc.*, of *N. Y.*, 39 *Super. Ct. (J. & S.)*, 1, followed in *Donvan vs. Board of Education of N. Y.*, 44 *Super. Ct. (J. & S.)*, 53, it was held error to dismiss the complaint on the ground that the evidence showed the falsity of allegations which the answer had admitted.

10. CONFORMITY OF RELIEF TO THE PRAYER OR DEMAND FOR JUDGMENT.

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| § 1037. Scope of the demand for judgment. | complaint appropriate to Legal action. |
| 1038. Damages limited by pleading. | § 1052. Legal or Equitable relief on same transaction. |
| 1039. Interest. | |
| 1040. Special damages not proven. | 1053. Equitable avoidance of defence to legal claim. |
| 1041. — — not alleged. | |
| 1042. Circumstances of aggravation not available alone. | 1054. Necessary allegations of fact. |
| 1043. Treble and single damages. | 1055. Equitable relief as to part, and damages as to part. |
| 1044. Amending as to damages. | 1056. Equitable defence and counterclaim. |
| 1045. Granting Legal relief under a complaint of an Equitable frame. | 1057. Equitable defence lets in plaintiff's equities. |
| 1046. Granting Equitable relief under a complaint of a Legal frame. | 1058. Affirmative relief in favor of defendant. |
| 1047. Causes of action of concurrent jurisdiction. | 1059. Rights of defendants in default. |
| 1048. Equitable ground for relief equivalent to Legal. | 1060. Relief between co-defendants — Omission of demand and service. |
| 1049. Legal case proved under complaint in Equity. | 1061. — In case of plaintiff's failure. |
| 1050. — by defendant's evidence. | 1062. — Incidental relief between co-defendants involved in shaping plaintiff's relief. ; |
| 1051. Equitable case proved under | |

§ 1037. *Scope of the demand for judgment.*—Under the New Procedure, if there is an answer, the Court may permit plaintiff to take any judgment which the evidence supports that is consistent with the case made by his complaint and embraced within the issues, notwithstanding he has demanded judgment for too much,¹ too little,² or the wrong relief.³

The same principle is applied in Equity where there is a general prayer for relief.⁴

But this principle does not permit judgment for plaintiff in hostility to the theory of the action and the substantial allegations of his pleading.⁵

¹ *Dodge vs. Johnson*, 9 *N. Y. Civ. Pro. R.*, 339. (Demand for too much.)

The rule that plaintiff may waive a part of the relief sought and take the other part, does not apply to a statutory action so as to enable plaintiff to recover for a different object than that named in the statute. *Ramsden vs. Ramsden*, 91 *N. Y.* 281. (Holding that under the divorce statutes plaintiff cannot waive the demand for a separation and take judgment for alimony alone.)

² *Wood vs. Brown*, 34 *N. Y.*, 337. (Accounting adjudged, under prayer for general relief.)

Simson vs. Chadwick, 20 *N. Y. Weekly Dig.*, 35. (Redemption adjudged, under prayer to remove cloud.)

³ *N. Y. Code Civ. Pro.*, § 1207. *Houck vs. Graham* (*Ind.*, 1886), 6 *North East. Rep.*, 594. (The Court say: "The prayer for relief does not determine the character of the pleading, nor assign it a particular theory. The facts give it character and effect. It is the substantial facts and not the general statements in form of conclusions either by pleader or witness that controls a cause.")

Evans vs. Schafer (*Ind.*, 1881), 21 *North East. Rep.*, 448. (Ejectment. After finding plaintiff's right of possession, omission of formal demand for judgment for possession disregarded.)

Rhea vs. Reynolds, 12 *Neb.*, 128. (Action on note, and to foreclose lien. Error to refuse judgment on the note, because lien was not established.)

Benedict vs. Benedict, 85 *N. Y.*, 625. (Under prayer for specific performance and general relief: foreclosure of lien for the purchase-money granted, where the facts alleged were sufficient to show such lien.)

Campbell Printing Press, etc., Co. vs. Damon, 48 *Hun* (*N. Y.*), 509. (Creditor's suit to reach specific property: judgment for value allowed, because the property could not be reached.)

⁴ *Jones vs. Van Doren*, 130 *U. S.* 684; s. c., 32 *Law. ed.*, 1077; 9 *Sup. Ct. Rep.*, 685. (Holding a prayer for general relief is sufficient to enable a court of equity to decree such relief as the facts stated in the bill justify.)

Shelby vs. Tardy, 84 *Ala.*, 327; 4 *So. Rep.*, 276. (A complainant may be entitled to partial relief coextensive with that part of his claim which the proof sustains, unless repugnant to the prayer for relief; and a general prayer is usually sufficient.)

Vicksburg, etc., R. R. Co. vs. Ragsdale, 54 *Miss.*, 200.

Boardman vs. Davidson, 7 *Abb. Pr. N. S.*, 439. (Holding the rule established by the Code to be the former equity doctrine.)

An amendment adding a general prayer for relief permissible in order to support a decree. *Adams vs. Kehlor Milling Co. (C. C. E. D. Mo.)*, 36 *Fed. Rep.*, 212.

* *Williams vs. Jackson*, 107 *U. S.*, 478. (In a suit by one whose debt is secured by a deed of trust, to set aside a release negligently executed by the trustee to the grantor, a decree for the payment of the debt by the trustee because of his negligence cannot be rendered. Such a relief would be inconsistent, as the object of the bill was to have the release declared void, and the trustee's liability was dependent on its validity.)

Wilson vs. Graham, 4 *Wash. C. C. (U. S.)*, 53. (Inconsistent relief not allowable under a general prayer.)

First Natl. Bank of Indianapolis vs. Root, 107 *Ind.*, 224; 5 *West. Rep.*, 286. (Complaint to enforce a lien created by a contract: decree to subject the property to sale under execution independent of the contract, not allowable. The Court say: "In Indiana every pleading must proceed upon some single definite theory, which must be determined by its general scope and character. To this theory, so determined, the party must be held through all the stages of the case, and upon it he must stand or fall.")

Graham vs. Read, 57 *N. Y.*, 681. (Where the complaint is based on the validity of a transaction, judgment cannot be based on its illegality.)

Rome, etc., Bk. vs. Eames, 4 *Abb. Ct. App. Dec.* 83; 40 *N. Y.*, 588. (Where a complaint claims the benefit of a trust deed, treating it as valid, relief cannot be given on the ground that the deed is void.) Approved in *Truesdell vs. Sarles*, 104 *N. Y.*, 164; s. c., 10 *South East. Rep.*, 139.

s. p., *Third National Bank vs. Cornes*, 107 *N. Y.*, 737; 6 *Eastern Rep.*, 360. (Creditors seeking to set aside a trust deed as void cannot recover on the ground that they were entitled to the surplus after payments to support beneficiary.)

§ 1038. *Damages limited by pleading.*—It is error to

award a recovery for damages exceeding the sum demanded in the pleading,¹ without previous amendment.²

If the verdict exceeds it, plaintiff must remit the excess, and take judgment for the residue only.³

¹ It is the final prayer for relief that limits the amount of damages recoverable, rather than the allegation of damages at the end of the respective causes of action; for the latter may be amended in support of a verdict, although not so as to exceed the sum stated in the demand for relief. *Schultz vs. Third Ave. R. Co.*, 89 *N. Y.*, 242, 247; s. c., 15 *Weekly Dig.*, 80; 46 *Super. Ct.*, 211.

² See next section.

³ *Cameron vs. Boyle*, 2 *G. Greene (Iowa)*, 154, followed in *Sedgw. on Dam.*, 514.

Annis vs. Upton, 66 *Barb. (N. Y.)*, 370.

§ 1039. *Interest*.—The fact that interest is not specifically demanded as a part of the relief, does not preclude the recovery of interest, if facts entitling plaintiff to recover interest are alleged and proved, and the demand of judgment is large enough to include it, in addition to the principal recoverable.

A demand of judgment for a specified sum "with interest" is sufficient for this purpose, but it may be construed to be limited to interest from the commencement of the action, unless it is apparent from other clauses of the demand or from the allegations that plaintiff's claim is for interest from a previous time or event, fairly specified.

Green vs. Dunn, 5 *Kan.*, 254. (Sureties' action for money; error to allow interest before suit in addition to the sum for which judgment was demanded.)

Haven vs. Baldwin, 5 *Iowa*, 503. (Action on a judgment. Held, a demand for judgment for a specified amount with interest, only entitled plaintiff to interest from the commencement of the action. The Court say: "A party may, it is true, so present his claim as to recover the previous interest. For instance, if he sues on a

promissory note or upon a judgment (stating the amount for which the note was given or judgment rendered), and the interest that may be due thereon.")

Butcher vs. Brand, 6 *Iowa*, 235. (Action on note. *Held*, that a demand for judgment for a specified amount with interest, enabled plaintiff to recover interest in addition to the sum claimed, from the time of bringing the action, but not interest that was due on the note before the action was brought. If he desired to recover such interest, he should have laid his *ad damnum* to a sufficient amount so as to have included it.)

s. p., *Anderson vs. Kerr*, 10 *id.*, 236; *Lyon vs. Byington*, *id.*, 124.

Smith vs. Watson, 28 *Iowa*, 219. (A petition set forth a note drawing interest, and asked judgment "for the amount due by the said note." *Held*, that interest due on the note to the date of judgment might be allowed.)

Compare Whitaker vs. Pope, 2 *Woods*, 463; *Meek vs. Lacy*, 6 *Ky. L. Rep.*, 516, modifying previous opinion.

§ 1040. *Special damages not proven*.—Failure to prove special damages alleged, or the withdrawal of all claim to them, does not entitle defendant to a dismissal of the complaint if plaintiff is entitled to general damages, although only nominal.

Kenny vs. Collier, 79 *Ga.*, 743; s. c., 8 *South East. Rep.*, 58. (Error to dismiss.)

McFadden vs. Rausch, 119 *Pa. St.*, 507.

s. p., *Vanderslice vs. Newton*, 4 *N. Y.*, 130.

1 *Chitt. Pl.*, 16 *Am. ed.*, 523. (Slander.)

§ 1041. *Special damages not alleged*.—If evidence of special damages not alleged has been received without any objection made before the close of plaintiff's case, it is not error for the Court to allow the jury to consider it.

Coster vs. Mayor, 43 *N. Y.*, 399, modifying 52 *Barb.*, 276.

[The reason is, that the ground for exclusion of special damage not pleaded is to protect against surprise; and the objection may be waived.]

§ 1042. *Circumstances of aggravation not available alone.*—If the grievance alleged as the cause of action is not proved, plaintiff cannot recover upon proof of circumstances of aggravation alleged merely as such, instead of being alleged as separate and distinct grounds of recovery.

United States Manuf'g Co. *vs.* Stevens, 52 *Mich.*, 330; 17 *North West. Rep.*, 934. Trespass in entering real property. GRAVES, Ch. J., said: "The substantive cause of action laid in each count is the tortious entry by the landlord on the demised premises during the existence of the tenancy; and the further circumstances of injury, including the putting out and exposure of the wagon hounds, are only matters of aggravation. They are not original and additional causes of action. Their office is purely subsidiary. They can have effect only in case of recovery for the breaking and entering, and their function is then to expand the right to damage which that wrongdoing has raised. [Citing *Taylor vs. Cole*, 3 *Term R.*, 292; 1 *H. Bl.*, 555; *Dye vs. Leatherdale*, 3 *Wils.*, 20; *Gelston vs. Hoyt*, 3 *Wheat. (U. S.)*, 246, 326, 327; *Eames vs. Prentice*, 8 *Cush. (Mass.)*, 337; *Knapp vs. Slocomb*, 9 *Gray (Mass.)*, 73; *Merriam vs. Willis*, 10 *Allen (Mass.)*, 118; *Howe vs. Willson*, 1 *Den. (N. Y.)*, 181; *Herndon vs. Bartlett*, 4 *Port. (Ala.)*, 481.] Unless the pivotal charge of injury is established, or, in other words, unless the breaking and entry is made out, the action must necessarily fail."

s. p., *Brown vs. Lake*, 29 *O. S.*, 64.

Bennett vs. McIntire, 121 *Ind.*, 231; s. c., 23 *North E. Rep.*, 78, and *cas. cit.* (Holding that though in an action for trespass to real property plaintiff may recover for debauching a member of his family, he cannot do so if the trespass to real property alleged as the gravamen of the action is not proved, or is justified.)

§ 1043. *Treble and single.*—Under the New Procedure, a complaint for statutory treble damages should not be dismissed because of failure to prove a case for treble damages, if the facts alleged and proved make a case at Common Law for single damages.

Starkweather vs. Quigley, 7 *Hun (N. Y.)*, 26.

§ 1044. *Amending as to damages.*—An amendment increasing the amount claimed, but not changing the cause of action, may be allowed at the trial.¹

Allegations of special damages for the same cause of action may also be added by amendment if defendant has not been misled.²

¹ *Dakin vs. Liverpool, etc., Ins. Co.*, 13 *Hun*, 122, *aff'd* in 77 *N. Y.*, 600; *Miaghan vs. Hartford Ins. Co.*, 24 *Hun* (*N. Y.*), 58; *Knapp vs. Roche*, 62 *N. Y.*, 614, *rev'g* in part 37 *N. Y. Super. Ct. (J. & S.)*, 395.

Tassey vs. Church, 4 *Watts & S. (Pa.)*, 141; *s. c.*, 39 *Am. Dec.*, 65.

Hodge vs. Sawyer, 34 *Wisc.*, 397. (Omission to demand interest said to be amendable.)

[In *Carr & Hobson vs. Sterling*, 114 *N. Y.*, 558, *rev'g* 53 *Super. Ct. (J. & S.)*, 255, it was said that this was so even where a defendant had made default in pleading. Unsound; for a defendant is entitled to rely on the demand of judgment as limiting the relief if he makes default; and he is not bound to appear and watch for amendments enlarging the demand.]

² *Clemons vs. Davis*, 6 *N. Y. Supm. Ct. (T. & C.)*, 523; *mem. of s. c.* 4 *Hun*, 260; *s. p.*, *Baldwin vs. N. Y. & H. Navigation Co.*, 4 *Daly (N. Y.)*, 314; *Flynn vs. Westmayer*, 4 *N. Y. Supp.*, 188; see also *s. p.*, *Miller vs. Garling*, 12 *How. Pr. (N. Y.)*, 203.

Additional wrongful acts of the same kind as that constituting the cause of action and accompanying the wrongful act complained of, although not such as to be admissible as mere matter in aggravation of damages, may be admitted upon amending the complaint by inserting an allegation of them at the trial. *Collyer vs. Collyer*, 50 *Hun*, 422; *s. c.*, 21 *State Rep.*, 118; 3 *N. Y. Supp.*, 310. (Slander. Words spoken at same time and in the same connection as those set forth in the complaint, added.)

§ 1045. *Granting legal relief under a complaint of an equitable frame.*—Under the New Procedure, a plaintiff who fails to establish his right to the equitable relief which his complaint demands, may, after answer, recover as on a cause of action of a legal nature to which his

allegations and his proofs show him entitled, although he has not demanded legal relief; provided, however, that no objection to the mode of trial is made.¹

If trial appropriate to the legal cause of action is demanded, the action should not be dismissed, but struck from the calendar or otherwise put in the way of proper trial.²

But under a complaint which states facts constituting a cause of action of an equitable nature only, plaintiff cannot recover on proving only a cause of action of a legal nature; for the facts constituting the legal cause of action should be pleaded, so as to entitle defendant to claim a trial by jury.³

¹ *Armitage vs. Pulver*, 37 *N. Y.*, 494; s. c., 5 *Trans. App.*, 186.

Williams vs. Slote, 70 *N. Y.*, 601. (Complaint for accounting: recovery for the sum due, allowed.)

Andrew vs. N. J. Steamboat Co., 11 *Hun (N. Y.)*, 490. (Complaint for undivided share in vessel built with plaintiff's materials without his consent: recovery for conversion of materials sustained.)

* *Black vs. White*, 37 *N. Y. Super. Ct. (J. & S.)*, 320.

As to retaining an action framed as an equitable one, under the New Procedure, so as to give damages instead of dismissing it, see *Sternberg vs. McGovern*, 56 *N. Y.*, 12; s. c., 15 *Abb. Pr. N. S.* 258. *N. Y. Ice Co. vs. N. West. Ins. Co.*, 23 *N. Y.*, 357; s. c., 12 *Abb. Pr.*, 414; 21 *How. Pr.*, 296; *Little vs. Webster*, 16 *N. Y. State Rep.*, 107; *Seeley vs. N. Y. Exch. Bank*, 8 *Daly*, 400 [aff'd on this opinion in 78 *N. Y.*, 608].

³ *Bradley vs. Aldrich*, 40 *N. Y.*, 504; *Wheelock vs. Lee*, 74 *id.*, 495; *De Bussiere vs. Holladay*, 4 *Abb. N. C. (N. Y.)*, 111.

§ 1046. *Granting Equitable relief under a complaint of a Legal frame.*—If a plaintiff fails to establish his right to the legal relief which he has demanded, he may, after answer, be awarded equitable relief to which his

allegations and his proofs show him entitled, although he has not demanded equitable relief.

But under a complaint which states facts constituting only a cause of action of a legal nature, he cannot have equitable relief upon the evidence alone.

Stevens vs. Mayor, etc., 84 *N. Y.*, 296.

Bulkley vs. Staats, 31 *Hun (N. Y.)*, 157. (Complaint for board of an infant: judgment enforcing trust for payment allowable.)

§ 1047. *Causes of action of concurrent jurisdiction.*—If plaintiff states a cause of action cognizable in equity as well as at law, a defendant who pleads and goes to trial on the merits cannot, after taking evidence, object as matter of right, that plaintiff has a plain, adequate, and complete remedy at law.¹

In Equity the Court may in their discretion dismiss such a case, even though no objection on that ground has been taken by defendant, either in pleading or argument.²

It is the better opinion that under the New Procedure it is error to do so, if the complaint is sufficient as a legal action.³

¹ *Kilbourn vs. Sunderland*, 130 *U. S.*, 505, 514; *May vs. Goodwin*, 27 *Geo.*, 352. (The objection is rather a question of convenience than of jurisdiction strictly.)

s. p., *Stout vs. Cook*, 41 *Ill.*, 447; *Cracker vs. Dillon*, 133 *Mass.*, 91; *Russel vs. Loring*, 85 *Mass.*, 121, 125 (saying that such objection should be made by plea or demurrer, or should be distinctly stated in the answer); *Blair vs. Chicago & A. R. R. Co.*, 89 *Mo.*, 383; s. c., 5 *West. Rep.*, 449; *Lehigh Zinc and Iron Co. vs. Trotter*, 43 *N. J. Eq.*, 185, 204; *Underhill vs. Van Courtlandt*, 2 *Johns. Ch. (N. Y.)*, 339, 369 (the Court say: "It would be an abuse of justice to permit the defendants after a protracted litigation to interpose a preliminary objection at a final hearing"). s. p., *Grandin vs. Le Roy*, 2 *Paige (N. Y.)*, 509; *Le Roy vs. Platt*, 4 *Paige (N. Y.)*, 77, 81. *Green vs. Milbank*, 3 *Abb. N. C. (N. Y.)*, 138. (Holding this rule still applicable under the New Procedure.)

s. p., *Pam vs. Vilmar*, 54 *How. Pr.*, 235 ; *Adams' Appeal*, 113 *Pa. St.*, 449; s. c., 5 *Cent. Rep.*, 135.

^a *Lewis vs. Cocks*, 23 *Wall. (U. S.)*, 466.

Mills vs. Knapp, 39 *Fed. Rep.*, 592, 595.

Dumont vs. Fry (S. D. N. Y., 1882), 13 *Reporter*, 677. (Saying it is the duty of the Court to do so.)

Lehigh Zinc, etc., Co. vs. Trotter, 43 *N. J. Eq.*, 185, 204.

Hine vs. City of New Haven, 40 *Conn.*, 478.

Reynes vs. Dumont, 130 *U. S.*, 354, 395.

^a *St. Paul & S. C. R. Co. vs. Robinson (Minn., 1889)*, 43 *Northw. Rep.*, 75.

§ 1048. *Equitable ground for relief equivalent to legal.*

—A demand for a judgment for a sum of money, or for recovery of possession, may be granted if the allegations and proofs establish the right thereto, although the complaint is framed as an equitable action,¹ or fails to indicate whether the action was intended as legal or equitable,² or is framed as a legal action and the recovery is on equitable grounds; provided the frame of the complaint enabled defendant seasonably to claim his rights as to the mode of trial, otherwise not.³

¹ *Bell vs. Merrifield*, 109 *N. Y.*, 202, 207 ; s. c., 14 *N. Y. State Rep.*, 796 ; 14 *Civ. Pro. R.*, 146. (Action to require a special partner in a limited partnership to pay over to a creditor of the firm the amount wrongfully taken by defendant from the assets after insolvency. Trial as an equity cause proper, although complaint only asked for a money judgment.)

² *Emery vs. Pease*, 20 *N. Y.*, 62. (Accounting.)

See *Hammond vs. Morgan*, 101 *N. Y.* 179 (recovery of chattel on equitable grounds.)

³ *Hale vs. Omaha Natl. Bank*, 49 *N. Y.*, 626. (Money judgment asked by way of damages: recovery by way of equitable relief allowed.)

Wright vs. Wright, 54 *id.*, 437. (Wife against husband.)

Zimmerman vs. Schoenfield, 3 *Hun (N. Y.)*, 692. (Ejectment: removal of cloud on title allowed.)

§ 1049. *Legal case proved under complaint in equity.*

—If, in a cause of an equitable nature tried as such with-

out a jury, plaintiff fails to prove anything more than a cause of action of a legal nature, he cannot have judgment thereon against defendant's objection that he, defendant, is entitled to a jury trial.¹

Such an action may be dismissed, leaving plaintiff to sue upon the same facts for legal relief.²

¹ *Brinckerhoff vs. Bostwick*, 106 N. Y., 567, 572.

So in an action for reformation of a contract, if plaintiff fails to prove any ground for reformation he cannot take judgment on the contract as in an action of a legal nature by claiming that its legal construction is the same as if it had been reformed. *Oakville Co. vs. Double Pointed Tack Co.*, 106 N. Y., 658.

² For instances, see *Trustees of Columbia Col. vs. Thacher*, 87 N. Y., 311; s. c., 10 *Abb. N. C.*, 235. (Refusal to enjoin breach of covenant after circumstances had changed.)

Wiedersam vs. Naumann, 10 *Abb. N. C.*, 149. (Remedy for infants whose land has been sold under a void judgment, is not in equity, but by ejectment.)

§ 1050. — *by defendant's evidence.*—If in a cause of an equitable nature tried as such, defendant shows that plaintiff has only a cause of action of a legal nature, plaintiff cannot object to submitting the cause for judgment on the ground that he has a right to a jury trial, for he himself chose his forum.

Davison vs. Associates of Jersey Co., 71 N. Y., 333, 340.

§ 1051. *Equitable case proved under complaint appropriate to legal action.*—If, under a complaint in a form appropriate to an action of a legal nature, plaintiff proves without objection equitable grounds entitling him to the relief demanded, it is too late at the close of the trial for defendant to object that the case ought to have been tried as an equity cause, and that the complaint will not support a recovery.

King vs. Van Vleck, 109 *N. Y.*, 363; *s. c.*, 12 *Centr. Rep.*, 311. *s. p.*, *Western R. Co. vs. Bayne*, 75 *N. Y.*, 1.

§ 1052. *Legal or equitable relief on same transaction.*

—When the complaint states facts giving an equitable cause of action and also a legal cause of action arising out of the same transaction, the party is entitled to have both tried if necessary to obtain his rights.¹

If defendant has no right to a different mode of trial as to either cause of action than the mode which the plaintiff is pursuing, it is error to dismiss the action if either ground of recovery has been substantiated by evidence.²

If the cause of action established is such that defendant is entitled to trial in a different mode from that which plaintiff is pursuing, it is error to dismiss the action absolutely, but plaintiff is entitled to have the other cause of action tried in the mode appropriate to it.³

¹ *Sternberger vs. McGovern*, 56 *N. Y.*, 12; *s. c.*, 15 *Abb. Pr. N. S.*, 257, rev'g 4 *Daly*, 456 (below cited).

Wright vs. Wright, 54 *N. Y.*, 437, affg. 55 *Barb.*, 505. (Action by wife against husband on promissory note. *Held*, that the objection that the action should have been in equity was not available, the complaint having alleged all the facts and the facts having been proved; objection to the frame of the action could not avail at the trial. REYNOLDS, J., says: "All that is needful is to state the facts sufficient to show that the plaintiff is entitled to the relief demanded, and it is the duty of the Court to afford the relief without stopping to speculate upon the name to be given to the action." [Citing *Marquat vs. Marquat*, 12 *N. Y.*, 336; *Emery vs. Pease*, 20 *N. Y.*, 64; *Corning vs. Troy Iron and Nail Factory*, 40 *id.*, 207; *Corn Exchange Ins. Co. vs. Babcock*, 42 *id.*, 593.]

² *Williams vs. Slote*, 70 *N. Y.*, 601. (Holding it error to dismiss the action in such case. "Whether the cause of action was legal or equitable, the defence to it and the mode of trial were the same, and in case plaintiff succeeded, the relief would be the same, *i.e.*, a judgment for money; and in such case it would be errone-

ous for a referee, even upon objection made upon trial, to dismiss the complaint on trial, because the cause of action was legal rather than equitable, or *vice versa*.”)

¹ *Sternberger vs. McGovern*, 56 *N. Y.*, 12; s. c., 15 *Abb. Pr. N. S.*, 257, rev'g 4 *Daly*, 456. (Action for specific performance and for damages, sufficient facts being stated to sustain each cause of action. *Held*, that on failure to prove facts entitling plaintiff to equitable relief, it was error to dismiss the action under the old rule leaving him to a new action at law, but he was entitled to a trial of the claim for damages, although that might require a different mode of trial.)

Compare Beck vs. Allison, 56 *N. Y.*, 366; s. c., 15 *Am. R.*, 430, rev'g 4 *Daly*, 421. (Holding that if plaintiff alleges a cause of action of an equitable nature and demands equitable relief, he cannot on failing to establish that claim, have judgment for legal relief on the same transaction, on the strength of evidence of additional facts necessary therefor proved at the trial, but not alleged in the complaint; but the complaint should be dismissed, unless amendment and a new trial of the same action is necessary to save the statute of limitations, and if so, the complaint should not be dismissed, for the Court may allow amendment, and a new trial as a common-law case.)

§ 1053. *Equitable avoidance of defence to legal claim.* —When plaintiff invokes equity in order to establish an affirmative cause of action, he must set forth in his complaint the facts upon which he bases his claim to equitable relief.¹

If, however, his allegation and proof make out a *prima facie* case of a legal nature, and the existence of facts requiring him to resort to equity is set up as an affirmative defence, he may without reply show an equitable avoidance of the defence.²

¹ *McClung vs. Foshour*, 47 *Hun (N. Y.)*, 421. (Reversing judgment for allowing recovery on such facts under such a complaint.)

² *Id.* (*dictum*.)

§ 1054. *Necessary allegations of fact.* —If plaintiff

alleges only facts entitling him to legal relief or only facts entitling him to equitable relief, he cannot, on failure to make out a case for such relief, proceed in the same action for the other kind of relief without amendment.

See cases under § 1027.

§ 1055. *Equitable relief as to part, and damages as to part.*—In an action of an equitable nature for specific performance, the Court may in furtherance of justice decree damages in lieu of specific performance as to one part and specific performance as to the other part of the agreement.

Post vs. West Shore R. R. Co., 50 *Ham*, 301 ; s. c., 3 *N. Y. Supp.*, 172 ; 20 *State Rep.*, 180. (Distinguishing *Uline vs.* (the New York Central and Hudson River Railroad Company (101 *N. Y.*, 98) as not in conflict with the views expressed, as that was not an action in equity, and saying that such distinction is recognized by the opinion of Judge EARL in these words (p. 121): “The case of *Henderson vs. New York Central Railroad Company* (78 *N. Y.*, 423) is not in conflict, as that was an equitable action, and in the opinion written in that case the rule is recognized to be otherwise in actions at law ; and the case of *Mahon vs. New York Central Railroad Company* is expressly recognized, and it certainly was not intended to overrule or depart from it or any of the prior authorities.”)

§ 1056: *Equitable defence and counterclaim.*—Under an equitable defence sufficient to defeat the action, with a prayer for affirmative relief which the absence of necessary parties prevents granting, the defence may prevail, but the demand for affirmative relief cannot.

Harris vs. Vineyard, 42 *Mo.*, 568.

The defence cannot prevail if affirmative relief is essential. *Carman vs. Johnson*, 20 *Mo.*, 108.

§ 1057. *Equitable defence lets in plaintiff's equities.*—One who sets up an equitable defence to a Common-Law action is in the position of a suitor in equity so far as that the equities of both parties must be considered.

Hoppaugh vs. Struble, 60 N. Y., 430.

§ 1058. *Affirmative relief in favor of defendant.*—Under the New Procedure defendant cannot have affirmative relief as against the plaintiff unless he pleads the facts entitling him to such relief by the way of counterclaim.¹

This rule does not, however, in an action of an equitable nature, prevent the Court from granting relief to plaintiff upon condition of the performance of such acts as may be necessary in order to do equity to defendant.²

¹ Wright vs. Delafield, 25 N. Y., 266. (Action to stay suits on certain notes, and for an accounting between stockholders of a voluntary association. The answer only alleged matters in defence, and prayed for no relief. *Held*, error to decree that plaintiff pay the notes in specific performance of the agreement for which they were given.)

s. P., Dale vs. Newman, 12 Nebr., 221, 224.

Thus where the answer in an action on an award impeached the award without impeaching the contract of submission,—*held*, that defendants on prevailing were entitled to have the award adjudged void, but not to have the submission vacated. Hiscock vs. Harris, 80 N. Y., 402.

² Beach vs. Cooke, 28 N. Y., 508, aff'g 39 Barb., 360.

Walden vs. Bodley, 14 Pet. (U. S.), 156.

§ 1059. *Rights of defendants in default.*—The rules allowing judgment after answer, without strict regard to the demand of relief, do not enable a plaintiff to have relief greater than that demanded in the complaint, if any of the defendants whose rights would be affected by such relief have not answered.

Briggs vs. Oliver, 68 *N. Y.*, 336. (*So held irrespective of the fact that relief might be for their interest.*)

§ 1060. *Relief between co-defendants,—Omission of demand and service.*—If co-defendants have litigated a question between themselves, without objection being made by either to the fact that there was no demand of relief in the answer of one as against the other, nor service on the latter, the Court may give judgment notwithstanding such omission, for the demand of relief and service of answer may be waived.

Riley vs. Sexton, 32 *Hun* (*N. Y.*), 245; *Syracuse Sav'gs Bk. vs. Porter*, 36 *id.*, 168.

But to make the adjudication a bar as between them there should be amendment. See *Milwaukee, etc., R. Co. vs. Chamberlain*, 3 *Wall.* (*U. S.*), 704.

s. P., *Fairchild vs. Lynch*, 99 *N. Y.*, 359; *s. c.*, 2 *North. East. Rep.*, 20, 23.

In *Grant vs. Phoenix Mut. Life Ins. Co.* (*U. S.*, 1887) a decree was held not an adjudication barring a subsequent action, although the defendants in the present bill had, by answer to the former bill, set up their claim against the present plaintiff, the defendant in that previous bill, and consented to the relief demanded therein.

§ 1061.—*In case of plaintiff's failure.*—If the plaintiff is not found to have a cause of action, the action cannot properly dispose of rights between the co-defendants not related to the cause of action disclosed in the complaint.

Hall vs. Ditson, 5 *Abb. N. C.*, 198, 214.

§ 1062.—*Incidental relief between co-defendants, involved in shaping plaintiff's relief.*—The Court may mould the relief granted to the plaintiff by such qualifications as to the mode of effecting it as are dictated by equitable principles in view of the relative rights and liabilities of the several defendants as presented on the trial, although so

doing may amount incidentally to relief as between them, and neither has demanded such relief by answer served on the other.

Dobbs vs. Niebuhr, 3 *N. Y. Supp.*, 415. (Not necessary that junior mortgagees should serve a copy of their answers on the mortgagor or owner of the equity of redemption in order to entitle them to obtain a provision in the decree of sale that the property shall be sold in one piece instead of in parcels.)

Bulymore vs. Seward, 15 *Weekly Dig.*, 283. (Answer by one of several defendants in foreclosure, which merely asks that a certain portion of a mortgage held by him be declared a prior lien to the plaintiff's, need not be served on the other defendants.)

In *Doble vs. Manley* (*Ch. Div.*, Feb. 1885), 33 *W. R.*, 409, the Court, in foreclosure, refused to fix different periods for redemption for different defendants who were in default. The judges were agreed that, "where the mortgagor and subsequent mortgagees do not appear, one time only should be fixed, whether the statement of claim alleges that the defendants are entitled, or only that they claim to be entitled, to mortgages on the property. To fix several times would be to make a decree as between co-defendants, which ought not to be granted except upon the request of a defendant."

11. AMENDMENT.

§ 1063. *How late may be allowed.*—An amendment to the pleadings may be allowed at any time before final submission of the case to the jury,¹ or (in a case tried by the Court) to the judge.²

[For other cases, see §§ 970-978.]

¹ *Holcraft vs. King*, 25 *Ind.*, 352. (Implying that in a case tried by a judge it may not be too late before finding.)

² *Hamilton vs. Southern Nev. G. & S. Min. Co.* (*C. C. D. Nev.*), 33 *Fed. Rep.*, 562. (During argument.)

Burns vs. Fox, 113 *Ind.*, 205; s. c., 14 *N. East. Rep.*, 541. (After argument.)

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